Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

JASON GRAY

Petitioner

v.

STATE OF CONNECTICUT

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner convicted of arson, 1st degree, sentenced to serve 6 of 15 years in prison. The prosecution's case relied upon opinion that a low burn char pattern indicated use of accelerant, that debris sample tested nine months after fire showed identity with xylene content of "Siloo", proof that Petitioner had last known access and proof offered to show conduct claimed to exhibit consciousness of guilt.

Issues:

Was the conviction of the Petitioner so devoid of sufficient evidence that Petitioner's rights to due process of law were violated where the evidence offered to support each conclusion claimed proven by the prosecution was conditional and dependent upon fulfillment of conditions of fact not proven; particularly where each proof allowed was prejudicial without instructions to the jury barring bootstrapping of proofs; where otherwise there was no evidence of arson, nor exclusive opportunity, nor evidence of motive, nor evidence rebutting proof offered by defendant that the time span from Petitioner's last access to discovery of fire was too long a period to have been consistent with the prosecution's theory of the case? and;

Were Petitioner's rights under the Fifth Amendment to the Constitution not to testify impaired by allowance of prejudicial conditional evidence which appeared to switch the burden of proof to Petitioner to disprove the condition in the absence of proof of the condition, violating a presumption of innocence?

PARTIES TO PROCEEDING

Petitioner: Jason Gray
106 Mill Road
North Haven, Connecticut

Respondent: State of Connecticut

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CITATION OF JUDGMENTS BELOW

1. Decision of Supreme Court of Connecticut, *State v. Gray*, 221 Conn. 713, A.2d . April 21, 1992, Appendix p. 3A.

2. Decision on motion for rehearing, dated May 21, 1992, Appendix p. A27.

JURISDICTIONAL STATEMENT

Grounds: Petitioner claims his right to due process of law under Fifth and Fourteenth Amendments of the United States Constitution were violated by conviction in criminal proceedings by verdict totally devoid of evidential support, by use of wholly incompetent evidence, and by use of unconstitutional burden of proof switching device.

Date of Judgment sought to be reviewed: April 21, 1992.

Date of order respecting a rehearing: May 21, 1992.

Statutory provision believed to confer jurisdiction: 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendments to the Constitution of the United States.

ARTICLE V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

ARTICLE XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce an law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

CONCISE STATEMENT OF CASE

PART 1.

Proceedings Below.

At the conclusion of the evidence, and after moving to strike the testimony of witnesses McKeon and Hubbell, Petitioner filed Requests to Charge and made oral motion to the trial court for acquittal and in motion for acquittal raised the issues of due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States in support of claim that the case should not go to the jury due to the failure of proof. Excerpt from oral motion is printed in the Appendix at A30. The motion was denied without comment as to the claimed Fifth and Fourteenth Amendment rights. Motions to the trial court for acquittal, to strike testimony of McKeon and Hubbell, and for directed verdict appear in the record below at pp. 16, 36, 38, 52, 59 of Appellant's Appendix.

By oral motion May 15, 1990, and written brief filed with the trial court dated July 23, 1990 the Petitioner raised the claims under the Fifth and Fourteenth Amendments as set forth in the Appendix hereto at pages A30 and A34 for the claim there was no evidence to convict and for the claim that burden of proof switching devices were being employed to deprive the Petitioner of Due Process of law and by devices to draw inferences from failure to testify. On July 27, 1990 oral argument on Motion for Judgment of Acquittal was permitted, which reclaimed Petitioner's right's under the Fifth and Fourteenth Amendments, [transcript 29-47] was denied without substantive comment and without comment on Fifth and Fourteenth Amendment claims.

By written brief filed in the Supreme Court of Connecticut, Petitioner asserted substantially similar claims, invoking the Fifth and Fourteenth Amendment claims that the evidence did not present a case that should be permitted to go to the jury, and that unconstitutional evidential burden-of-proof-shifting devices were used. The Supreme Court of Connecti-

cut expressly passed upon and denied the claims of the Petitioner, by Footnote 3 printed herein, and by statement there was absence of merit to Petitioner's claims, which the court denied by reference to Petitioner's other claims. Footnote 3 appears at 221 Conn, 726. The denial of Fifth and Fourteenth Amendment claims appears in a seven line Part IV of the opinion at p. 730.

The Connecticut Supreme Court has decided an important question of federal law which has not been and should be settled by this Court. It decided that a conviction supported only by proofs of conditionally relevant evidence may be upheld without proof of the facts upon which the offer of conditionally relevant evidence was predicated, in the face of claims that the record was devoid of evidence necessary to convict under the Fifth and Fourteenth Amendments to the United States Constitution. It further permitted the prosecution to rest without proof of conditions, under circumstance which would necessarily switch the burden of proof to the defendant in a criminal proceeding in violation of the Fifth Amendment.

PART 2

The case presented by the prosecution:

The prosecution made argument to the jury at trial that Petitioner, an employee of an automobile sales agency, committed arson to his employer's garage by pouring 12 to 15 ounces of "Siloo" diesel fuel anti-gel on the second floor of the parts department, then setting fire. This argument was based upon circumstances described herein, without proof of motive.

The state presented evidence that the Petitioner reported to senior employee Hugins that Petitioner detected an odor on the second floor, that Hugins inspected and detected only an "exhaust" smell. Petitioner then returned to the second floor and brought oil filters from the second floor to the first floor counter at about 8:15 a.m., July 7, 1989, and proceeded to stack the filters under the sales counter in the presence of a senior employee, Calvin Hugins, and co-employee, Marianne McKeon, for a period of 29 minutes when smoke descended

down the stairwell at 8:44 a.m. to the first floor giving notice of fire which was thereupon reported to the fire department which responded in approximately 1 1/2 minutes. It took 45 minutes to get the fire under control. Petitioner was the last person known to have descended from the second floor. The State also offered evidence Petitioner had stated to co-employees McKeon and Hugins the day preceding the fire that he had smelled a chemical like smell on the second floor, and offered evidence that Petitioner did not usually undertake to volunteer to do work. Also, that when the smoke was discovered, the Petitioner ran to the area of his desk, to retrieve the keys to his truck.

The local fire marshal, Robert Westervelt, a witness for the prosecution testified that when accelerants are used to start fires a low burn pattern is created, that he found a low burn pattern, and he concluded that the cause of the fire was use of an accelerant. During investigation, the fire marshal took photographs of the fire in progress. (Exhibits C-I) After the fire, the fire marshal took photographs of the area where he concluded the fire originated, before and after the burned debris was shoveled into a dumpster. A charred section of floor was photographed after debris removal, and described by the fire marshal as the area he believed was the burn caused by accelerant. After the floor was washed with water, perhaps before, he took 6 samples which were placed in metal paint cans and he also took 3 other items to the state's forensic laboratory for testing. The State Laboratory refused all but five samples for testing. The fire marshal also went to the storage area on the first floor of the parts department and selected eight items (sprays, oil, anti-gels, and carburetor cleaners) for comparison testing, five of which were accepted by the State Laboratory. During his testimony, presented by the State prior to any evidence of laboratory testing, the fire marshal testified that no facts not already in evidence were relied upon by him in the formation of his opinion. His conclusions as to the cause of the fire were exclusively based upon what he saw at the scene of the fire. At the end of his

testimony, Exhibit T was still only an exhibit for identification.

Later, at trial, after the fire marshal concluded testimony, the Chemist, witness Jack Hubbell, from the state laboratory testified that the contents of can #3, now Exhibit T, matched the contents of a can of "Siloo" after gas chromotography and mass spectrometry.

The last witness called by the State, Marianne McKeon, testified that about two hours after the fire, the Petitioner stated to her that "They think I did it". Motions to strike this testimony made immediately and again before verdict were denied. There was no prior proof that the prosecution gave notice of intent to present this evidence. Prior witnesses were not asked to testify concerning conversations with Petitioner after the fire and before this statement.

The state claimed that the aforesaid conduct on the part of the Petitioner exhibited consciousness of guilt, that the fire marshal's conclusion based upon the burn pattern was sufficient to prove arson, that the findings of the state laboratory was corroborating evidence, that Petitioner had last known access, that he exhibited consciousness of guilt.

The jury requested a reading of the testimony of Marianne McKeon and shortly after rendered verdict of guilty.

PART 3.

Deficiencies in the prosecution's case.

The record presented was wholly devoid of evidence sufficient to convict because each and every proof submitted by the state did not exclude the reasonable possibility and likelihood that the Petitioner was innocent.

The First Proof:

1). The prosecution's first proof was that a low burn pattern was found, that when accelerants are used a low burn pattern will appear. The proof was conditioned upon the proof of non-existence of other conditions which were competent producing causes of low burn patterns which mimic the pattern of accelerant use. The factual condition was not proven. The proof was further conditioned upon the non-existence of conditions which were independent causes for

ignition of fire. Proof of both conditions were lacking and actually disproven by testimony of prosecution witnesses.

a. The reasonable possibility that the burn pattern was not caused by accelerant was established by the state's own evidence.

The evidence that a burn pattern can be caused by a liquid accelerant is conditionally relevant, and the condition requires proof that no other cause of burn pattern existed, or that conditions were present which were inconsistent with other causes.

Through the fire marshal, evidence was adduced that other competent producing causes of burn pattern existed and all were present at this location, that such burn patterns will mimic the pattern caused by accelerants, and that under such circumstances, a burn pattern by itself is not proof of accelerant use. The fire marshal recognized author John D. DeHaan, as a highly qualified authority in arson detection, and through his testimony a published DeHaan article entitled *"Are Localized Burns Proof of Flammable Liquid Accelerants"* was qualified as authoritative and admitted into evidence, printed in record below, Appellant's Appendix p.3. The fire marshal's testimony as to his agreement with the DeHaan Article appear in the Appendix hereto. A40 This testimony, together with the DeHaan article with its illustrations of radiant heat from hot gasses causing floor fire, proved the existence of recognized co-causes of low burn patterns that mimic use of accelerant, i.e.:

i. High levels of radiant heat can be generated by hot gasses which will quickly raise the temperature of the surface of wooden floors and cause charring, pyrolysis and ultimately combustion of floors, thus a cause of low burn pattern.

ii. The effect of radiant heat is increased in commercial structures where shelves and combustible stock and large fire combine and will produce what appears to be very carefully laid path in the aisle which can be mistaken for a trailer of flammable fluid, thus a cause of low burn pattern.

iii. The burning of solids, such as cardboard cartons filled with paper records and burning material falling from

rafters will each create appearances of floor area deep burns, localized around the margins of the solid fuel burning on the floor, thus a cause of low burn pattern.

Also, through the testimony of the fire marshal and other witnesses called by the state, it was proven that the conditions necessary to create a burn pattern as described in the DeHaan article existed at the scene, in that:

1. Sources of high levels of radiant heat existed. The fire at ceiling height melted or burned out the light bulb, light bulb base, and the metal receptacle from inside the ceramic fixture located nearest to the first broken window and "burn pattern". The roof over the second floor was concrete, which would not burn through, a fact which would cause heat within the room to be retained as the solid roof would not allow heat to escape. The fire could not be brought under control until the concrete was sawed through to allow ventilation. Photographs taken during the fire showed the firemen were obliged to break windows to allow heat to escape, this also allowed fresh air to directly enter the second floor area where the burn pattern was subsequently observed, allowing fresh air to entrain, ignite and fan the fire in the area of the subsequently discovered burn pattern, at low levels, and to thereafter produce hot flames and black smoke which exited from the high areas of the window. These photographs showed that subsequent to the breaking of the window, ignition occurred in the area where the burn pattern was later found, and fire gradually and forcefully erupted with flames first kindling down low and later roaring through the broken window, all adjacent to the "burn pattern" area.

2. The burn pattern area was also surrounded by wooden shelving which extended to the concrete ceiling, and the shelving held combustible cardboard and plastic wrapped packages, which at higher levels held long packages which extended out over the aisles. The concrete ceiling was supported by steel rafters, which were used to store combustible automobile floor mats, containing plastic and rubber.

3. Solid fuels were present adjacent to the burn pattern area. The area near where the burn pattern was photo-

graphed was then used for storing rubber tires, cardboard cartons filled with old paper records, along with other clutter, and yet was passable on foot, leaving open space for formation of burn pattern area during the fire.

4. Dropdown melted plastic appeared in the burn pattern area. The fire marshal had not accurately mapped out the location of the overhead rafters, nor the exact position of the overhead light fixtures. The exact position of boxes on the floor which would have affected the location of the burn pattern were not mapped with respect to the burn pattern's shape before being shoveled to the dumpster. The positions of boxes on the floor could not be ruled out as causes of the shape of burn pattern. Proof of dropdown in the area where papers were stored and solid fuels existed showed the existence of conditions which were reasonably competent producing causes of low burn pattern, thus, the reasonable possibility that low burn patterns were not caused by accelerant.

5. The juxtaposition of cardboard cartons and other solid fuels with vertical sides ignited during the fire would produce radiant heat which would be exchanged with radiant heat from the floor producing a deeper burn at the perimeter of the burn pattern. Location of the cardboard cartons had been swept out by the firemen without recording positions of boxes.

6. The fire marshal extracted samples of wood and other material from the direct area where he photographed the burn pattern. The floor in this area did not produce any sample which tested positive for an accelerant. The fire marshal did not know if there was a subflooring. There were seams between the floor boards, at which the fire marshal did not extract sample for testing in his search for liquid accelerants according to recommended forensic procedure. Absence of positive test for accelerants in the burn pattern shows the reasonable possibility that no accelerant created the burn pattern.

7. The area of the burn pattern had previously been utilized by former employees for spray painting automobile

rear view mirrors. Two burned-out aerosol paint cans were located in the debris. The amount of their contents before the fire was unknown, and their presence, as a source of liquid fuel, is not proven.

8. No proof was presented by the prosecution to establish any fact that burn pattern found could not have been produced by the aforesaid conditions with respect to this particular fire.

b. The fire marshal did not have sufficient knowledge to reach the conclusions that he testified to on his direct examination, to wit:

On cross-examination of the fire marshal, it was developed that he did not believe at the time of his direct testimony that hot gasses could produce radiant heat; he did not believe radiant heat could travel downward. Appendix A38-A40. These misconceptions as to basic essential knowledge were later conceded by the fire marshal to be erroneous after he was confronted with the DeHaan article. It also developed that he did not believe that the heat reached at floor level exceeded 200° F. Yet, the first fireman to reach the top of the stairs had testified the fire was the hottest ever experienced, at the end of the second floor, opposite from the "origin" area, temperatures were in excess of 400° F. It was also shown that the fire at ceiling height melted or burned out the light bulb, light bulb base, and the metal receptacle from inside the ceramic fixture.

c. The was no proof that indigenous producing causes of ignition were absent at the fire.

The contrary proposition was proven from the fire marshal's own testimony. While the fire marshal purported to say he ruled out all other causes of fire on direct examination, on cross-examination he admitted that along the ceiling of each aisle was a row of incandescent light bulbs, unguarded by any cage sufficient to prevent contact with packages projecting from the higher shelves. The fire marshal described naked incandescent light bulbs to be a fire hazard. Long packages were stored on the higher shelves. Rafters were used for storage. A combustible accidentally pushed

into contact with a light bulb could cause pyrolysis, charring of package, and subsequent ignition of cardboard or plastic. Subsequent to the fire, any evidence of such mishap is consumed by the fire and is gone. The possibility of such ignition was not ruled out by competent evidence. Defendant's evidence showed that the Ekblade Oldsmobile had been cited for poor housekeeping in its parts department by its insurance carrier.

The fire marshal stated he had ruled out electrical causes of the fire. The fire marshal had not qualified as an expert in electrical matters. Photographs he took showed electrical wiring running from a plug to the second floor which had not been inspected nor detected by the fire marshal. Petitioner's evidence was that the town electrical inspector appeared at the fire and was sent away by the fire marshal. The reasonable possibility that electrical causes might have existed required the testimony and inspection by the electrical inspector or his equal.

The fire marshal had not made any measurements nor mapped out the locations of boxes found partially burned with respect to the perimeter of the burn pattern area at any time during his investigation. Proof that the location of such combustible solid fuels did not co-relate to the size and shape and cause of the burn pattern had not been preserved.

The Second Proof:

2). The prosecution's second proof was that a can containing charred debris was tested by gas chromotography and mass spectrometry nine months after the fire and that contents matched a product containing the petroleum hydrocarbon xylene sold by the automotive garage operated by Petitioner's employer and stored for retail sale on the first floor of the parts department: "Siloo" diesel anti-gel.

The proof was conditioned upon proof that:

a) the contents of the can when tested were the identical uncontaminated contents placed into the can by the fire marshal at the time of the inspection and that they came from the area where the low burn pattern appeared.

b) the place from which this particular sample of debris was taken was not exposed to xylene contamination by normal operation of the garage resulting from storage of xylene-cleaned used automobile parts.

c) that the conditions of the simultaneous nine month storage of the tested debris and tested sample did not permit contamination of the tested debris from the tested sample, or proof the xylene found had not been contaminated by the state's own sample.

None of the foregoing conditions were proven.

No evidence was presented that any empty "Siloo" can was found in the debris after the fire, or elsewhere.

The state was required to prove not only what was in can #3, Exhibit T, when it was tested, but that what was in the can could not have come from a source other than the alleged tossing of "Siloo" .

The forensic laboratory performed two sets of tests. The first tests were done in July, 1989, with reports typed September 5, 1989. (Printed in record below, Appellant's Appendix p.8) Debris samples tested in the July of 1989 were taken directly from the area of the burn pattern found in the plywood floor. These tests were negative and confirmed that the fire was not arson. The Petitioner was nevertheless arrested before the written report could be submitted with application for warrant. At trial, test performed and reported on as of September 5, showed all burn pattern debris and floor samples were tested negative for accelerant, and no claim was made to the jury to the contrary by the state.

After jury selection commenced, on April 24, 1990, counsel for the Petitioner met with prosecution. Immediately thereafter, the state requested new tests upon a new and different gas chromotography process: mass spectrometry. A previously untested can, can #3, later Exhibit T was then sent to the state laboratory for testing. (Appellant's Appendix p.13) Also, the "Siloo" can, previously tested for comparison in July, 1989 was again sent to the laboratory to again be reopened and tested. It was on this test, nine months post fire, that the state laboratory Chemist stated he found a match be-

tween Exhibit T and "Siloo". Meanwhile, the corrosive materials in can #3, Exhibit T rusting for nine months had destroyed the integrity of the can. When the fire marshall departed the witness stand, Exhibit T had not yet been marked as a full exhibit. The expectation was that the fire marshal would be recalled to provide specific, substantively necessary testimony as to the source, care and custody of its contents while in his possession. Such testimony was essential to the contamination issue, and further, if he claimed said sample came from the specific burn pattern area, he should have been asked. When presented at trial the can showed disintegration of the walls of the can with open holes clearly caused by rust alone. The can's condition was photographed immediately after verdict, May 16, 1990, (Exhibits 1a, 1b, 1c, and 1e.) along with the condition of the "Siloo" can, which showed the residuary deposits about its top from long term leakage after the seal was first broken. Exhibit 1d, Exhibits filed July 27, 1990. The laboratory Chemist said that when he tapped can #3 with a shoemaker's awl, the sides of the can fell off leaving the holes along the sides of the can. Again the state laboratory reopened the "Siloo" can and again sampled its contents.

The state was obliged to offer proof that the "Siloo" can had not pre-contaminated can #3, Exhibit T, before testing, and subsequent to the fire, either directly by leakage of liquid contents, or indirectly, as by evaporation and by the process of adsorption, a scientific phenomena attributable to the ability of charcoal to adsorb gasses from the atmosphere.

At the conclusion of the evidence, Petitioner's motion to strike the evidence of the State Laboratory Chemist for lack of foundation and failure to recall the fire marshall was denied. The oral motion appeared in the appendix to the appeal below. Appellant's Appendix p.36.

After verdict, before sentencing, the Petitioner had produced two expert witnesses to the trial judge for the purpose of demonstrating the need on the part of the state to have originally produced evidence that no contamination of the sample was possible as a precondition to the relevance of the

state laboratory chemist's testimony, and the realities of the possibility of contamination. One was metallurgist, the other an expert in the science of petroleum and gas chromotography and mass spectrometry, a Ph.D., employed by the United States Coast Guard. The court permitted only a limited offer of proof without testimony, permitting only a statement of the testimony expected. The testimony expected was that exhibit T, can #3 was porous when it went for re-testing, and that the gas chromatographies of the sample from can #3 showed that the lighter molecules common to the two cans tested and relied upon by the state were predominant and therefore consistent with transfer by evaporation and adsorption, and inconsistent with a residue of a fire burned product in which the lighter molecules are consumed by fire. Also expected: proof that the gas chromotograph taken by the state from can #3, Exhibit T, did not match the gas chromotograph of "Siloo" in that the proportions of the common molecules found indicated a high ratio of lighter molecules, a finding consistent with transfer by adsorption or contamination following evaporation. Appellant's Appendix 142.

There was no proof that the contents of Exhibit T came from the burn pattern area. The fire marshal had taken can #3 from a place near the east wall. No evidence of its origin is specifically connected to the place of burn pattern. Moreover, although he photographed it, the fire marshal had not observed nor seen the existence of an automobile engine head lying along the east wall in location consistent with the source of Exhibit T debris and not proven otherwise. The employees of Ekblade did not recall the engine head. There was evidence that the engine head showed signs of prior use and was a used part. There was evidence that the engine part would have been degreased, that Xylene is a petroleum product which has as a primary use the degreasing of automobile engine parts. The trial court did not permit the submission to the jury of photographs taken on the second floor of Ekblade parts department three weeks prior to trial showing boxes containing used parts, with evidence of the leaking petroleum residue through the cardboard boxes and onto the floor.

(Exhibits 41-56 for identification) The evidence did not exclude the automobile engine part and its cleaning agent as source of the discovery in can #3.

After the state laboratory Chemist testified, the fire marshal was not recalled to testify as to the care taken to prevent contamination while the "Siloo" can and can #3, Exhibit T were in his possession from September 1989 to April of 1990. He did not testify the cans were not stored in common plastic bag, nor did he testify as to the separation of cans during the trip to Meriden, Connecticut in April 1990 for re-testing. The fire marshal's testimony had not dealt with the subject matter of contamination prevention, nor his care and custody of the sample cans during that period nor his efforts to prevent contamination. There was no evidence whatever before the jury as to precautions taken. Exhibits showed "Siloo" and can #3 were specially together for the ride to Meriden in April of 1990. Also, the "Siloo" can was opened and re-closed in April of 1990. There was no evidence as to the weight of the "Siloo" can in September, 1989 as compared to its weight in April, 1990. The possibility that the cans were stored in common plastic bag was never disproven by the state, although a large plastic bag was found in the court room after the case went to the jury in the clerk's waste basket (Exhibit 71 for identification). The fire marshal was not recalled before the state rested; thus presenting the issue whether the burden appears to have shifted to the Petitioner to disprove the purity of the state's evidence on the issue of contamination, and on the condition necessary to relevance.

The Third Proof:

3). The prosecution's third proof was that the Petitioner was the last known person to have descended from the second floor. This proof was conditioned upon proof that no other person could had access to the second floor subsequent to the time he descended, and is additionally conditioned upon independent proof that the fire was caused by arson and by use of accelerant, and that the 1/2 hour time lapse was consistent with fire ignited by accelerant.

The prosecution failed to prove the Petitioner had exclusive access to the second floor. The second floor was accessible by a rear entrance on the first floor level near the stairway to the second floor. There was no proof that the rear door was closed, guarded, locked, nor that the second floor was inaccessible from the rear door during the half hour prior to the discovery of smoke. There was no proof that a one-half hour time lapse was consistent with delay between an ignition commenced with use of accelerant and discovery of smoke. The Petitioner's expert offered proof that under such circumstance, smoke would have observed within a 3-5 minute period. This testimony was not rebutted. The prosecution had prepared with an expert who had done computerized time lapse studies, for which no evidence was offered. The rebuttal witness, Detective Toscano, reported that an error in the studies had been made. In any event, the error was not corrected and no rebuttal was produced.

The Court below, fn.2, p,722, gave probative value, without evidence, to a conclusion that "Hugins and Keselewski were never under any suspicion . . .". Petitioner Gray was not the employee accountable for shortages in inventory; at trial subpoena for inventory records produced information that computer records were over six months out date at the time of fire. There was proof Keselewski was the last person to leave the parts department every day, and the day preceding fire. The Court permitted the jury to speculate that Petitioner had committed arson under a guise of permitting the jury to reject speculation. Such process was rejected by the Connecticut Supreme Court in *State v. Villano,* 176 Conn. 301, 303, 407 A.2d 969; and *Toomey v Danaher* 161 Conn. 204, 211, 286 A.2d 293. Petitioner was not the beneficiary of any fire insurance policy covering inventory against loss. There was no proof that Keselewski's immediate whereabouts was investigated for corroboration. By the same process the court permitted the jury to conclude there was no contamination, and that Gray was not under suspicion for the purpose of interpreting the statement testified to by Marianne McKeon.

The fire marshal photographed an ashtray containing cigarette butts found on the second floor of the sales agency in the vicinity of the origin of fire. A negligent smoker was not ruled out by competent evidence.

The Fourth Proof:

4) The prosecution's fourth proof was testimony that approximately two hours after the fire was under control that the Petitioner stated to a co-employee "They think I did it".

The proof was conditioned upon proof that Petitioner had not been caused to attribute his statement to his reaction to a statement made to him or proof that no statement was made to him. Proof of the condition was not offered.

The admission of such evidence without proof of condition effected a burden of proof switching device, prejudicially calling upon defendant to testify to explain the statement in violation of Fifth Amendment rights not to testify. The jury's only question requested reading of this testimony. The jury was given the information to use in reaching a verdict. They had a right to assume the court had deemed the evidence relevant for use. An inadmissible unfounded accusatory statement took on a life of its own: Petitioner became a suspect because he reacted to an accusation as would any innocent person.

If the statement was taken at face value, it stood for proof that an accusation had been made. The prosecution's theory appears to be that the jury could first disbelieve the statement, and second, without other proof, conclude the opposite to be true.

The Fifth Proof;

5) The prosecution's fifth proof consisted of claims that Petitioner's conduct exhibited consciousness of guilt in the following respects, a) that prior to the fire the Petitioner reported to co-employees that he detected a chemical like odor on the second floor, b) that during the half hour period prior to the discovery of fire the plaintiff was busy at his job, and c) that when the smoke was discovered he ran to his desk to retrieve the keys to his truck.

These proofs were conditioned upon independent proof that the fire was in fact caused by arson, and are proofs not otherwise available to prove the fire was caused by arson without circular reasoning or "bootstrapping" the process of proof. A fire caused by conditions of contact between light bulb and combustible will produce an odor. Doing a job that is within the scope of duty does not give rise to an inference. Salvaging property in emergency situations does not give rise to any inference. The presumption required by the Fifth Amendment bars such speculation.

Guilt cannot be presumed when the conduct is evaluated. The Petitioner should have had for this purpose the benefit of a Constitutional presumption of innocence. Standing by themselves, the claims of proof were meaningless.

No issue of premeditation was presented. The claim made by the prosecution, and vouched for by the state, was prejudicial and erroneous, but mostly unfair in depriving Petitioner of due process of law.

ARGUMENT

The record was devoid of evidence sufficient to sustain a conviction causing the petitioner to be deprived of a fair trial in violation of his constitutional rights under the Fifth and Fourteenth Amendments.

The admission of conditionally relevant evidence without proof of condition is an unconstitutional burden switching device which violated petitioner's rights under the Fifth and Fourteenth Amendments.

Justice Berdon of the Connecticut Supreme Court dissented from the opinion below. Without agreeing with any statement found in the majority opinion, Justice Berdon found the record did not support a claim that Petitioner had sole access to the second floor, that the was no proof the rear entrance was closed, or locked, and no evidence that it was guarded, or under anyone's observation, and that the claims that Petitioner's statement or conduct amounted to consciousness of guilt were not proven by competent evidence. He found there was not one shred of evidence in the record to support a claim that no one had spoken to the Petitioner accusing him of setting the fire, a necessary basis for a conclusion in support of the state's case for its proposition that Petitioner's statement: "They think I did it" was evidential, and he found that the statement was out of context. In addition the dissenting Justice found the record was barren of proof of motive. The dissenting opinion expressly concluded that Petitioner was deprived of his federal constitutional rights to due process of law under the Fifth and Fourteenth Amendments, due to the tenuous nature of the evidence and that the jury had to resort to speculation and conjecture.

When evidence produces only a foundation for a "conjecture", a verdict based thereon must be vacated as totally devoid of proof under the Fifth and Fourteenth Amendments. *In re Winship*, 397 U.S. 358, 364, 90 S Ct 1068, 25 L Ed. 2d 368. Where the evidence should not have gone to the jury in the first instance, the verdict based thereon should not have been looked to for support by the majority opinion below as

set forth 221 Conn. 724. A conjecture is a conditionally relevant proof, but when the condition is not proven, the conjecture remains a conjecture incapable of supporting an inference, and incapable of supporting a verdict.

In this matter, the Connecticut Supreme Court was presented with a case based entirely upon an onslaught of multiple conjectures. Each of the conditionally relevant proofs never found proof of the facts necessary to the inferences asserted, and upon which they were founded. The major claim that the "burn pattern" would permit a conclusion that an accelerant was used did not find proof that no other possible cause of the burn pattern existed. In fact, the condition was affirmatively disproven by evidence extracted from the fire marshal himself. This claim did not receive attention in the opinion of the Connecticut Supreme Court.

If the proceeding had been conducted under the Federal Rules of Evidence, the prosecution would have been unable to comply with the requirements of FRE Rule 104(b).

Rule 104. Preliminary Questions.

> **(b) Relevancy conditioned upon fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

The Notes of the Advisory Committee on Rules stated in part:

> Subdivision (b). In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus, when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labelled "conditional relevancy". Morgan, Basic Problems of

> Evidence 45-46 (1962). Problems arising in connection with it are to be distinguished from the problems of logical relevancy, e.g. evidence in a murder case that the accused on the day before purchased a weapon of the kind used in the killing, treated in Rule 401.
>
> .... If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration. Morgan, supra; California Evidence Code 403; New Jersey Rule 8(2). See also Uniform Rules 19 and 67.

28 USCS Appendix 34.

A similar rule of court is not found in Connecticut.

Connecticut decisions prior to the decision below were consistent with the rule of FRE Rule 104(b) as applied to proofs resting upon circumstantial evidence: *State v. Villano,* 176 Conn. 301, 303, 407 A.2d 969 (Opportunity is no more than one circumstance which coupled with others might be sufficient, but standing alone proves nothing.); *State v. Mayell,* 163 Conn. 419, 311 A.2d 60 (Flight must be supported by proof defendant knew he was wanted; fingerprints on rearview mirror of abandoned vehicle regularly rightfully driven not evidence); *Malvicini v. Stratfield Motor Hotel, Inc.* 206 Conn. 439, 538 A.2d 690 (Exclusive control necessary to invoke res ipsa loquitur); *Toomey v Danaher* 161 Conn. 204, 211, 286 A.2d 293 (Other causes bar recovery in civil proceedings, inferences cannot rest upon guess, conjecture or speculation).

The former rule in Connecticut, and FRE Rule 104(b) were not or are not procedural in nature. What constitutes proof is a matter of substantive law when the issue is relevancy. A conditionally relevant fact standing by itself proves nothing, and is therefore no evidence at all. A conditionally relevant fact is to be distinguished from a fact, which independently of all other facts, is admissible under FRE Rule 401, and which is sufficient by itself to prove a probability, as distinguished from a possibility.

Hereinafter, this Petition discusses whether evidence of a low burn pattern by itself independently established use of an accelerant. The standard appeared in evidence in the Article by John D. DeHaan entitled *"Are Localized Burns Proof of Flammable Liquid Accelerants"* wherein he stated: **"Investigators should be suspicious of isolated low burns but they are not proof of the use of flammable liquids."** Appendix A45. The existence of "numerous causes" denies a conclusion even in a civil case, where the conclusion reached need not exclude all reasonably possible causes. *Toomey v Danaher* 161 Conn. 204, 211, 286 A.2d 293.

All horses are four legged animals; ergo: all four legged animals are horses. Query?. A mere "consistency" with a proposition is insufficient proof in law and in logic to establish any supposition as proven. A "consistency" is only a conditionally relevant proof. There were more consistences with innocence in the evidence than there were with guilt.

The eruption of flames photographed by the fire marshal from the area of the burn pattern through the window broken by the firemen to permit evacuation of heat and fumes, the boxes which created a source of solid fuel for fire at floor level, the evidence of combustible material hung from steel rafters, the wooden shelves and combustible matter stored, together with a concrete roof created conditions which were proximate producing causes of a low burn pattern in manner authenticated by the testimony of the fire marshal. The claim of the Petitioner that the existence of other competent producing causes of burn pattern without proof of facts inconsistent with such other causes prevented the drawing of inferences of guilt is not discussed in the opinion below.

Light bulbs exposed to potential contact with projecting combustibles were competent producing causes of fire and the reality and reasonableness of such potential cause of fire was not competently disproven. Such contact would produce a forewarning smell when the bulbs were lighted.

Evidence that the sample tested from Exhibit T was free of contamination required direct testimony. In its decision below, 221 Conn. at p. 721 and at 726-7, the Connecticut Su-

preme Court totally failed to state the proofs presented to the jury which could establish the conduct by which Exhibit T had been preserved from contamination. The Connecticut Supreme Court acting as a reviewing court on appeal cannot find facts. It cannot be inferred that such proper care of the "Siloo" can was taken to prevent that can from contamination because some other can was still leaking at trial, and therefore direct testimony as to care and custody of Exhibit T was dispensable in a fair trial. An error of constitutional magnitude results. Proof of the conditioned fact was absent.

The Supreme Court of Connecticut found that the testimony of Marianne McKeon was supportive of the conviction (221 Conn. 716, 724) and also averted a finding of error as to the admission of its evidence by finding, p. 725, that the statement was sufficiently equivocal as to support both guilt and innocence, and that admission for consideration by the jury was not abuse of discretion and constituted harmless error, citing *Dunham v. Dunham,* 204 Conn. 303, 324, 528 A.2d 1123. *Dunham* relied upon *State v. Fritz,* 204 Conn. 156 at 167, 527 A.2d 1157, (1987) wherein the court stated "We have consistently held that 'evidence is relevant only when it tends to establish the existence of a material fact or to corroborate other direct evidence in the case.' " No claim of corroboration of other direct evidence was presented. There was a departure from prior decisions, including *State v. Mayell*, 163 Conn. 419, 311 A.2d 60 (1972) and *State v. Osman*, 218 Conn. 432, 437, _ A.2d __ (1991) as well as *State v. Jackson*, 176 Conn. 257, 264, 407 A.2d 948 (1978) where it was stated: "Moreover, inferences which do not have a basis in facts established by the evidence cannot be drawn or relied upon to sustain the verdict". The court's conclusion that the statement is supportive of innocence should have required a finding that the evidence was not supportive of guilt, that mere consistency is insufficient, that when a proposition is equally consistent with guilt or innocence without proof of additional facts, that only a conjecture has been proven, with prejudice.

The Connecticut Supreme Court denied Fifth and Fourteenth Amendment claims raised by the Petitioner as to the evidence of witness McKeon by footnote 2, p 722, stating:

> The defendant has raised two other claims related to the admission of this statement. Both merit little discussion.
>
> In the light of the lack of evidence that authorities had spoken to the defendant before he made his statement, we conclude that there is no merit to the defendant's claim that he was forced, in violation of the fifth and fourteenth amendments to the United States constitution, to testify against himself in order to exonerate himself with respect to his statement.
>
> Because we determine that the trial court did not abuse its discretion in admitting the statement, we disagree with the defendant's claim that a curative instruction was required with respect to the admission of the statement into evidence."
>
> [underscore added]

The theme of the majority Connecticut Supreme Court decision was that lack of evidence that Petitioner had been talked to in a manner causing him to react to unfair accusation was the test. The prosecution was thus allowed to rely upon lack of evidence to prove its case. Petitioner had claimed that the burden to produce evidence showing state of mind rested with the prosecution, that the prosecution had a burden to offer affirmative proof that Petitioner had not been talked to. The "lack of evidence" criteria unconstitutionally switched the burden of proof to the Petitioner. The presentation of evidence now acknowledged by the State of Connecticut to be equivocal, (221 Conn. at 725) has raised the inference of guilt in violation of the United States Constitution, Articles Fifth and Fourteenth. At 221 Conn. 724, the court had deferred to the jury's acceptance of the evidence as proof of guilt. The jury was permitted to ask itself: "why did he say that and why did he not take the stand to explain". The Fifth

Amendment reads in part: "nor shall be compelled in any criminal case to be a witness against himself . . . .". The only inference available from Petitioner's statement on its face was that he had been talked to. The prejudice of acknowledgement of accusation was imposed upon Petitioner.

A statement admitted in violation of Fifth Amendment rights will result in reversible error, since the prosecution cannot on the one hand offer evidence to prove guilt, which evidence is vouched for as tending to that end, and on the other hand, for the purpose of avoiding the consequence of the error caused by its wrongful admission, be heard to assert that the matter offered was not prejudicial because it did not tend to prove guilt. *Bram v. United States*, (1897) 168 U.S. 532, 18 S Ct 193, 42 L Ed. 568. Annotation: 31 L Ed. 2d 930. The harmless error rule of *Schneble v. Florida*, 405 U.S. 427, 432, 92 S Ct 1056, 31 L Ed. 2d 340, 345 is inapplicable, to wit: the jury was especially attracted to the testimony of McKeon and the jury requested the reading of her testimony; the remainder of the evidence was fatally flawed as conditionally relevant, with condition not proven.

> The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. at 364, 25 L Ed. 2d 368, 90 S Ct 1068. 51 Ohio Ops 2d 323. This "bedrock, 'axiomatic and elementary [constitutional] principle", id., at 363, 25 L Ed. 2d 368, 909 S Ct 1068, 51 Ohio Ops 2d 323, prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. *Sandstrom v Montana*, supra, at 520-524, 61 L Ed. 2d 281, 97 S Ct 2319 (1977); *Patterson v. New York*, 432 U.S. 197, 210, 215, 53 L. Ed

2d281, 97 S. Ct 2319 (1977) *Mullaney v Wilbur*, 421 US 684, 598-701, 44 L Ed. 2d 508.

[*Francis v Franklin*, 471 US 304, at 313, 105 S. Ct 1965, 85 L. Ed 344, 3523]

> The question before the Court in this case is almost identical to that before the Court in *Sandstrom*; "whether the challenged jury instruction had the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of ... state of mind," 442 US, at 521, 61 L Ed. 2d 39, 99 S Ct 2450, by creating a mandatory presumption of intent upon proof by the State of other elements of the offense.

[*Francis v Franklin*, 471 US 304, at 313, 105 S. Ct 1965, 85 L. Ed 344, 353]

> A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury. *Ulster County Court*, supra, at 157-163, 60 L Ed. 2d 777, 99 US Ct 2213.

[*Francis v Franklin*, 471 U.S. 304, at 314-5, 105 S. Ct. 1965, 85 L. Ed 344, 353-4]

The prosecution was merely seeking to "end run" the constitutional amendments by attempting to categorize the defendant's conduct as consciousness of guilt, and without proper foundation. *New Hope v. Duplessie* (1975), 324 Minn. 417, 231 N.W.2d 548; *United States ex rel Smith v. Braerly*, (1967 CA 3 Pa); 384 F.2d 992; *People v. Hodson* (1950), 406 Ill. 328, 94 N.E. 2d 166

Thus an inference attempted from any conditionally relevant fact without proof of the condition is not constitutionally permissible. An inference not justified by reason and logic is no better than a legislative mandatory presumption not founded upon reason and common sense. In either event, "The possibility is sufficiently real that a conviction resting on the ... presumption cannot be deemed a conviction based

upon sufficient evidence" *Turner v United States*, 396 U.S. 398, 424, 90 S Ct 642, 24 L Ed. 2d 610, 627. (1970)

The jury was not entitled to disbelieve any statement attributed to the Petitioner and conclude that disbelief was substantive proof of the opposite being proven. *Novak v. Anderson*, 178 Conn. 506, 507-8, 423 A.2d 147 (1979). It is error to submit such a proposition to a jury which is wholly unsupported by the evidence. *State v. Rose,* 169 Conn. 683, 687, 363 A.2d 1077.

If Petitioner's running for his truck keys is viewed in the light of the Fifth Amendment constitutional presumption of innocence, his doing so is guiltless. Only by presuming his guilt before considering his conduct can a conclusion that he demonstrated consciousness of guilt be arrived at. Similar observation applies to his reporting he smelled an odor. This evidence cannot be used to prove an incendiary fire without first assuming an incendiary fire existed. The Federal Rules of Evidence do not allow the use of "bootstrapping". *United States v. Stipe*, (1981, CA10 Okla) 653 F.2d 446, 8 Fed Rules Evid. Serv. 668.

A real possibility of innocence calls for acquittal in a case founded upon insufficient proofs of circumstantial evidence.

The majority opinion of highest court of the State of Connecticut denies the Petitioner his federal right, under the Fifth and Fourteenth Amendments of the United States Constitution to protection from unfair prosecution based wholly upon proofs which are by definition only conjectures, conditionally relevant, and in each instance without proof of the condition. While the Petitioner's claims are substantial, the majority opinion of the Supreme Court of Connecticut has stated twice over that the claims made have no merit. The court's test was to give great deference to the jury's conclusion that Petitioner's conduct and statement manifested a consciousness of guilt, a test which puts the cart before the horse. 221 Conn. at 724. At this point in the opinion, it is established that information the jury should not have had for the purpose of evaluating guilt was approved for use to the prejudice of Petitioner because they used it.

The majority opinion below, at 221 Conn. p. 718, 721 and 726-727 tends to blur the evidence at trial in that: a) Detective Toscano testified only in rebuttal, and his evidence enumerated only "consistencies" with the state's theory; b) the sample in Exhibit T was taken generally "from the area where the fire originated", stated by the court, but, there was no proof that Exhibit T was taken from the area of the "burn pattern". There was evidence Exhibit T was taken from a point near the east wall, and evidence that along the east wall the engine part was photographed and evidence that the engine part was not noticed by the fire marshal; c) there was no testimony as to the conditions of storage, between September of 1989 and the retesting performed in late April, 1990; d) (from opinion, p.721):

> the presence of Siloo in the sample can containing debris from the southeast corner was not attributable to contamination during storage from another can leaking Siloo because the leaking can contained a different brand of diesel fuel antigel that would have been detected by the mass spectrometer had it contaminated any of the samples;

and (from opinion, p.727):

> the debris was not contaminated with Siloo while in storage because the different brands of diesel fuel antigel, including Siloo, had been stored in separate boxes and *the only can* that leaked was a diesel fuel antigel of a different brand than Siloo - a brand that would have been detected by the spectrometric analysis.
>
> [italics added]

There was no testimony at trial that the "Siloo" can was not leaking. The reported non-leakage condition is not inferable from the condition shown by Exhibit 1d for identification filed July 27, 1990. There was only a mention that a second can was leaking during trial. There was inferable proof on the Siloo can itself that it was or had been leaking. There was no proof the "Siloo" can was not in leaking condition

prior to reopening before retesting. In the aforesaid manner, the Connecticut Supreme Court, suo moto, determined that because at trial another can was leaking, that the leaking second can obviated all need for the fire marshal's testimony as to storage conditions of "Siloo". The supposition is based upon a conditionally relevant proposition, with conditions not proven. The "Siloo" can had been reclosed after the April test. Was it leaking before the April test is the critical question. The "Siloo" can was separated from the other can immediately before being tested, for the purpose of being sent to Meriden. The second can referred to by the Connecticut Supreme Court was not re-tested in April of 1990 (April 24-26, 1990 records of State Forensic Laboratory, Appellant's Appendix 13-15) and subjected to the mass spectrometry re-testing comparison done for "Siloo", nor then had its cap re-closed to prevent further leakage. An assumption that both cans had equally possessed molecules for which charcoal had identical affinity for adsorption is presumed without scientific testimony from the Chemist who testified for the prosecution. The leaking of any can illustrated lack of care. This theory offered to satisfy the purity of the sample tested was not provided to the defense at any time during trial and did not appear in the briefs or arguments submitted to the Connecticut Supreme Court. Photographs of the "Siloo" can marked as exhibits at post trial motions showed a residue of leakage about the top of the can. Petitioner's claims with respect to the fire marshal not being recalled after the Laboratory Chemist testified dealt with the failure to present proof as to the care taken to prevent contamination during storage. The opinion below reports the stored, used automobile engine head had been "cleaned". The Petitioner claimed it had been degreased, with evidence that xylene is a primary degreasing agent, that the photographs taken three weeks prior to trial showed relevant sloppy residues on similar parts stored for warranty returns to manufacturer.

Evidence that a) the state had not ruled out and could not rule out fire originating from contact between a burned out light bulb and a totally consumed combustible and b) that

the fire marshal made an incomplete inspection as he did not record the position of objects under the burned out light bulb nor record the location of the spots of melted dripdown plastic residues was transmuted in the words of the majority to: "... he did not see any material either in contact with or lying on the floor directly beneath this fixture." 221 Conn. at 719. The fire marshal had a positive duty to see, to document, to record, to inspect and to prove. The opinion does not report he looked, nor that he had related facts as to what he did see. There was no evidence from which the jury could have concluded that facts were established which were inconsistent with ignition of fire between light bulb and a combustible, and no evidence is reported to that end in the opinion. The opinion below has left open whose burden it was to so prove. The burden was switched.

The opinion makes no comment as to the rotted through condition of the tested can, which at trial could be seen through with its thousands of holes, although its photograph appeared in Appellant's Appendix, p. 1, filed in the court below. The opinion is silent as to the duty of the prosecution to have come forward with direct comprehensive testimony that addressed the issue of the care and custody of Exhibit T while it was rotting away and the issue of the care and custody the can of "Siloo" when both cans were in possession of the fire marshal. The burden was switched.

The Petitioner's federal due process claims were not properly dealt with below. This is illustrated by the absence of a report in the opinion that proofs of competent producing causes of burn pattern were developed in the evidential record through unimpeachable testimony of the prosecution's own witnesses. The opinion should have decided whether this evidence left the fire marshal's conclusion in the realm of unexplained conjecture for the reason that he related no fact and no observation which rendered the other causes of burn pattern described by DeHaan to be inapplicable, improbable or inconsistent.

The jury verdict does not cure the deprivation of Fifth and Fourteenth Amendment rights for the reason that the jury did

not receive the substantive issues complained of herein with instructions that put relevancy issues to them squarely as a question of fact. The flavor of unfairness of trial proceeding is illustrated by Requests to Charge the jury not granted appended in the appendix hereto at A47, and record below in Appellant's Appendix 116, 124. The Court's Charge to the jury appears at p. 61, exceptions at p. 96 of Appellant's Appendix below.

At the time that the prosecution rested its case, the defendant had a right to rely upon such cases as *State v. Villano, State v. Mayell, Novak v. Anderson, Malvicini v. Stratfield Motor Hotel, Inc.* and *Toomey v. Danaher*, supra, as representing principles of Connecticut law which could be relied upon for purposes of a fair trial under the Fifth and Fourteenth Amendments.

CONCLUSION

The primary reason why this petition should be granted is that the Petitioner should not be deprived of liberty and confined to State Prison on even a temporary basis when his conviction is arrived at only by violating his constitutional rights. The trial court did not protect the Petitioner's rights and permitted the jury to consider all incompetent evidence which the State vouched for as warranting a conviction. The Petitioner raised his Fifth and Fourteenth Amendment rights at trial and on appeal. His rights have not been given serious attention by the majority below. Petitioner's claims were directed to the absence of necessary proofs and the State's evidence disproving its own claims.

The State of Connecticut did not offer proof the can tested had not been contaminated. The Respondent cannot claim it had proof an accelerant was used. A valid test was not conducted, nor connected up. There was no "Siloo" can found at the scene. After proof that conditions existed that account for burn pattern, no proof was presented of any fact that would allow such proof to be disregarded as improbable. The court below admits absence of evidence touching upon proof that no one had talked to Petitioner. A conviction that is sustained by a silent record is untenable under the Fifth

Amendment. The opinion of a "fire marshal" who did not know the mechanics of heat transfer by the process of radiation at the time he formed his opinions (Appendix p.40) does not qualify in law as "expert" testimony. At least, not when and with respect to the process by which other causes were involved, when such was by radiation.

District Courts of the United States should not be overburdened by convictions unconstitutionally obtained in state courts where the record is totally devoid of competent evidence and where claims that the state has not met its burden of proof according to the mandates of the United States Constitution have not been answered directly in the state court when properly raised.

Respectfully submitted
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No. _____

In The

Supreme Court of the United States

October Term, 1992

JASON GRAY

Petitioner

v.

STATE OF CONNECTICUT

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDIX
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STATE OF CONNECTICUT *v.* JASON GRAY (14172)

SHEA, J., GLASS, COVELLO, BORDEN and BERDON, Js.

Convicted of the crime of arson in the first degree in connection with a fire at an automobile dealership where he worked, the defendant appealed to this court. He claimed, inter alia, that the evidence presented was insufficient to support his conviction. *Held:*

1. The jury could reasonably have concluded beyond a reasonable doubt that the fire was incendiary in origin; the jury was entitled to credit the testimony of the state's experts that the fire had been intentionally started by an accelerant and to reject the testimony of the defendant's expert that the fire had been accidental in nature.
2. The jury had before it sufficient evidence for it to conclude that the defendant was the culpable party; the defendant had the opportunity to set the fire, he had access to the accelerant used to start the fire,

[10] Because the trial court must consider all financial orders de novo, we do not consider the plaintiff's third and fourth claims concerning the sufficiency of the trial court's award of periodic alimony and counsel fees. As this court has previously stated: "[T]he trial court on remand could no more fashion just and equitable financial orders by reconsidering only the issue of [property distribution], than it could reassemble a broken vase with only one piece." *Sunbury* v. *Sunbury*, 210 Conn. 170, 173, 553 A.2d 612 (1989).

he appeared to have an insider's knowledge about the nature and location of the fire and he manifested consciousness of guilt.

(One justice dissenting)

3. The defendant could not prevail on his claim that the trial court improperly denied his motion to strike the testimony of a witness who stated that the defendant had told her that law enforcement authorities thought he "did it"; that court did not abuse its discretion in determining that that evidence was relevant to establish consciousness of guilt.
4. The defendant's challenge to the admission into evidence of a spectrometric analysis of the contents of a can of debris taken from the area of the fire was unavailing; because there was no reasonable possibility that the contents of the can were contaminated by a source other than arson, the trial court did not abuse its discretion in determining that the evidence was probative.
5. The defendant could not prevail on his claim that the trial court should not have admitted the testimony of the state's arson investigator as rebuttal testimony, the challenged testimony having generally contradicted the testimony of the defendant's expert witness.
6. The defendant's challenges to the trial court's jury instructions were unavailing; that court did not improperly refuse to charge that the state had to demonstrate that the defendant had exclusive access to the area of the fire, and that court correctly charged the jury that proof beyond a reasonable doubt must exclude every reasonable hypothesis inconsistent with guilt and that evidence is confined to exhibits or the testimony of witnesses.

Argued December 5, 1991—decision released April 21, 1992

Substitute information charging the defendant with the crime of arson in the first degree, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Gormley, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

David M. Reilly, with whom were *Matthew G. Galligan* and *Peter B. Reilly*, for the appellant (defendant).

Mitchell S. Brody, assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *David Gold*, assistant state's attorney, for the appellee (state).

COVELLO, J. This is the defendant's appeal from his conviction of arson in the first degree in violation of

General Statutes § 53a-111 (a) (1).[1] Following a jury trial and a guilty verdict, the trial court rendered judgment sentencing the defendant to fifteen years imprisonment, execution suspended after six years, and five years probation. The issues on appeal are: (1) whether the evidence presented at trial was sufficient to support the defendant's conviction; (2) whether the trial court improperly ruled on the admissibility of certain evidence; (3) whether the trial court improperly refused to charge the jury upon a variety of subjects as requested by the defendant; and (4) whether the proceedings, when viewed in their totality, denied the defendant the right to a fair trial. We affirm the judgment.

The jury might reasonably have found the following facts. At the time of the July 7, 1989 fire, the defendant and Calvin Hugins both worked under the supervision of Peter Keselewski in the parts department at Ekblade Oldsmobile (Ekblade), an automobile dealership and service center in Hamden. The defendant had been employed in the parts department for two months, picking up and delivering parts to various automobile dealerships, garages and automotive body shops. Hugins had been employed as the clerk at the parts department service counter for two years, supplying parts to either the service center or retail customers.

The parts department is located in a two story building. The first floor contained, inter alia, a service counter, metal bins, and a desk. Ekblade used the service counter to display small quantities of high demand items such as oil filters and antifreeze. The metal bins contained small parts and various chemicals, including

[1] General Statutes § 53a-111 (a) (1) provides that "[a] person is guilty of arson in the first degree when, with intent to destroy or damage a building, as defined in section 53a-100, he starts a fire or causes an explosion, and (1) the building is inhabited or occupied or the person has reason to believe the building may be inhabited or occupied."

WD-40 and Siloo, a diesel fuel antigel. Ekblade did not store these chemicals on the second floor. The second floor, which can only be reached by a flight of stairs at the rear of the first floor, contained, in part, cartons of oil filters and large parts. It is a five foot by thirty-three foot room with a plywood floor, a concrete ceiling supported by joists, and rows of storage shelves.

On July 6, 1989, at 3 p.m., the defendant informed Hugins that he had noticed a chemical smell emanating from the second floor of the parts department. Hugins, unable to detect any chemical odor, told the defendant to speak to their supervisor, Keselewski. Also that day, the defendant told an Ekblade employee from another department, Marianne McKeon, that he smelled something unusual coming from the second floor. McKeon, like Hugins, did not notice anything unusual but, similarly, urged the defendant to inform Keselewski. Later, at 4 p.m., Keselewski asked the defendant to close a window on the second floor. After returning from the second floor, the defendant said nothing about any unusual odors coming from the second floor. At no time did the defendant ever mention his concerns about chemical smells to Keselewski. Keselewski, like McKeon and Hugins, did not detect any chemical smell when he closed the parts department between 5:30 and 6 p.m.

The next day, July 7, 1989, Hugins opened the parts department at 7 a.m. At 8 a.m., the defendant again told Hugins that he smelled chemicals emanating from the second floor. Hugins searched the second floor but did not notice any unusual chemical smell. Approximately fifteen minutes later, between 8:15 and 8:20 a.m., Hugins noticed that the defendant was restocking the parts counter with oil filters that the defendant had obtained from the second floor. At 8:30 a.m., when Keselewski called Hugins from another car dealership, the defendant was talking with McKeon.

About twenty to twenty-five minutes after Hugins observed the defendant shelving the oil filters, Hugins saw smoke coming from the area of the stairs to the second floor. Hugins turned off the first floor lights and reported the fire by telephoning the "911" emergency number. The defendant told McKeon that he had to get his keys and rushed toward his desk in the rear of the first floor. McKeon, who attempted to follow the defendant but then turned back because of the blinding smoke, did not see the defendant again until sometime between 11 a.m. and 12 p.m. when he stated: "[T]hey think I did it."

At 8:44 a.m., Hamden firefighters were sent to Ekblade and they arrived shortly thereafter. The firefighters encountered dense smoke and extreme heat and noticed flames in the eastern and southeastern corner of the second floor. By 9:30 a.m., approximately thirty-five to fifty firefighters were able to subdue the flames.

I

The defendant first claims that the record reflects insufficient evidence to support his conviction. He argues that the state failed to establish, beyond a reasonable doubt, that: (1) the fire was intentionally set; and (2) he was the person criminally responsible for its occurrence. We disagree.

A

Experts for both parties presented conflicting testimony at trial as to whether the fire was incendiary or accidental in nature. The state's expert witnesses, Robert Westervelt, Hamden's fire marshal, Joseph Tuscano, a senior arson inspector, and Jack Hubbell, the chemist in the state forensic laboratory, proffered opinions that tended to show that the fire was intentionally set. Westervelt inspected the scene on the morning

of July 7, 1989, the day of the fire. Tuscano examined the parts department later that month. They both opined that the fire started in the southeast corner of the second floor where there was a "classic pour pattern" on the floor created by the ignition of a flammable accelerant. Westervelt theorized that the arsonist used approximately twelve to fifteen ounces of a liquid accelerant to start the fire. Westervelt and Tuscano noted that the extensive charring at the base of the shelves was consistent with this theory. Tuscano further testified that the rate at which the fire developed was consistent with the ignition of a flammable accelerant.

Westervelt explained that, in contrast to fires ignited by ordinary, combustible items, which start slowly and gradually build in size and strength, fires started by a flammable accelerant burn rapidly. He testified that the pattern of burning on the walls did not follow a straight line, as occurs with a slow burning fire, and that the second floor window panes were clear and did not exhibit the heavy glaze commonly associated with a slow burning fire.

Westervelt further supported his theory that a flammable accelerant had been utilized to start the fire by explaining how he caused forensic tests to be performed on materials he had collected from the scene of the fire. He testified that, at various times, he had taken samples from the second floor area where the fire originated. Among these were liquid that had been sponged from the floor, debris from the southeast corner of the floor, and a can of Siloo. He placed the samples into cans, sealed them and brought them to the state forensic laboratory for analysis. Hubbell tested the floor debris with a mass spectrometer and found the presence of xylenes, an extremely flammable liquid. Upon performing a spectrometric analysis of the Siloo and

comparing it to the xylenes found in the floor debris, Hubbell found that the two samples had an "almost perfect match" in their chemical constituents.

In discounting other possible theories, Westervelt eliminated the second floor light bulbs as a cause of the fire. He determined that all of the bulbs were intact except for one located one foot north of the fire's point of origin. Although the glass portion of that bulb was missing, Westervelt found that the wires and connections were still intact and that there was no evidence of pitting or melting consistent with temperatures that would give rise to sparking. Further, he did not see any material either in contact with or lying on the floor directly beneath this fixture.

The defendant's expert witness, Matthew Conlon, concluded, however, that the fire probably originated at a light bulb and then radiated downward. Conlon based his testimony on examinations of photographs of the fire scene; he did not visit the actual scene of the fire. Conlon opined that a light bulb of a wattage too high for the fixture could have melted and then dripped molten material to the floor causing secondary ignition. Alternatively, he testified that a bulb could have come into contact with material on the upper portion of a shelf thereby causing a fire. Conlon maintained that the burn patterns on the floor were caused by material that had dropped to the floor after the fire had already ignited above ground.

Conlon testified further that an electrical cord, which had originated on the first floor and extended to the second floor, may have been a cause of the fire. He also opined that Hugins would have noticed the fire sooner if the defendant had indeed ignited the flammable accelerant twenty to twenty-five minutes earlier.

It is well established that in reviewing a claim of insufficient evidence, a two-part inquiry is undertaken.

"We first review the evidence presented at the trial, construing it in the light most favorable to sustaining the jury's verdict. We then determine whether, upon the facts thus established and the inferences reasonably drawn therefrom, the jury could reasonably have concluded that the cumulative effect of the evidence established guilt beyond a reasonable doubt. . . . In this process of review, it does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct." (Citations omitted.) *State* v. *Sinclair*, 197 Conn. 574, 576, 500 A.2d 539 (1985). Findings of fact that are consistent with guilt are afforded great deference unless they are improbable and unconvincing. *State* v. *Osman*, 218 Conn. 432, 437, 589 A.2d 1227 (1991). In finding facts in cases of conflicting expert testimony, a jury may choose to believe one expert over another. *State* v. *Famiglietti*, 219 Conn. 605, 612, 595 A.2d 306 (1991).

The jury in this case was entitled to reject Conlon's testimony and credit the testimony of the state's experts that the pour pattern on the floor was a manifestation of the ignition of the flammable accelerant Siloo and that the fire spread from this source. In declining to believe Conlon, the jury was aware that he had never visited the site even though he admitted that it would have been "much better" for purposes of his investigation if he had done so. Additionally, the jury knew that Conlon's theory that the light bulbs had ignited the fire had been rejected by the state's experts. "Once the state's expert testimony was found credible by the jury . . . that evidence established beyond a reasonable doubt that the fire in this case was incendiary in origin." *State* v. *Famiglietti*, supra, 612.

The defendant claims, however, that even if Siloo was the agent used to ignite the fire, there were innocent explanations for its presence in the floor debris. We disagree.

The "jury's function is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . [I]n viewing evidence which could yield contrary inferences, the jury is not barred from drawing those inferences consistent with guilt and is not required to draw only those inferences consistent with innocence." (Internal quotation marks omitted.) *State* v. *Grant*, 219 Conn. 596, 604, 594 A.2d 459 (1991), quoting *State* v. *Dumlao*, 3 Conn. App. 607, 616–17, 491 A.2d 404 (1985). Here, the jury was entitled to draw, from conflicting evidence, the following reasonable inferences that reject the defendant's theories and that are consistent with guilt: (1) Siloo was not inadvertently tracked onto the second floor by automobile mechanics because either Hugins or the defendant, not the mechanics, obtained the parts from the second floor; (2) Siloo was not introduced onto the second floor as a result of being left on an automobile cylinder head that was stored there, due to the mechanics' practice of cleaning spare parts prior to storage; (3) the presence of Siloo in the sample can containing debris from the southeast corner was not attributable to contamination during storage from another can leaking Siloo because the leaking can contained a different brand of diesel fuel antigel that would have been detected by the mass spectrometer had it contaminated any of the samples; and (4) the absence of Siloo from samples of the floor and floor board on the second floor could be explained either by evaporation and burning away or by the washing of the floor by firefighters *after* the floor debris samples had been taken but *before* the floor and floor board in question were analyzed.

B

The defendant next claims that, even if the fire was incendiary, there was insufficient evidence to show that he was culpable. He argues that the evidence was

insufficient because: (1) he did not have the exclusive opportunity to cause the fire; and (2) there was no proof of motive. Because we have never held that proof of either motive or exclusive opportunity is required to convict an accused of arson, we conclude that these claims are without merit. *State* v. *Famiglietti*, supra, 614 (state did not have to establish a motive for arson); *State* v. *McPhail*, 213 Conn. 161, 171, 567 A.2d 812 (1989) (jury was entitled to convict defendant of arson even though others had motive and opportunity to set dwelling on fire).

The jury had before it sufficient evidence to conclude that the defendant was culpable. Based upon evidence that he had an opportunity to set the fire, that he had ready access to Siloo, the flammable accelerant that had started the fire, that he appeared after the fire started to have an insider's knowledge about the nature and location of the fire, and that he manifested before and after the fire a consciousness of guilt, the jury could have reasonably concluded that the defendant was guilty beyond a reasonable doubt. We discuss these conclusions seriatim.

Other than the time, on the morning of the fire, that Hugins spent inspecting the second floor following the defendant's protestations about "chemical smells," the evidence showed that the defendant was the only person who had been on the second floor that day, before Hugins noticed the fire. See *State* v. *Famiglietti*, supra, 614 (accused's presence on premises shortly before start of fire was probative of issue of identity).[2] The

[2] We agree with the dissent that the facts of this case are distinguishable from those in *State* v. *Famiglietti*, 219 Conn. 605, 595 A.2d 306 (1991), in that, here, the defendant did not have sole access to the scene of the fire. The cases are similar, however, insofar as "the record in this case contains direct evidence of the defendant's presence at the premises shortly before the fire and of his continued presence there at a time when [the fire started]." Id., 614. This presence is probative of the perpetrator's iden-

defendant's presence on the second floor immediately preceding the fire was especially significant in view of Keselewski's testimony that it was unprecedented for the defendant to have gone to the second floor on his own initiative to obtain parts. Further, the defendant had ready access to Siloo, which was stored on the first floor near the service counter. See *State* v. *Cimino*, 194 Conn. 210, 213, 478 A.2d 1005 (1984) (access to flammable accelerant probative of issue of identity).

The jury could have reasonably concluded that the defendant knew about the origin and location of the fire when he ran to the back of the first floor to get his keys even after Hugins had noticed the smoke and called "911." The jury was entitled to compare and contrast the defendant's and McKeon's reactions to the dense smoke and conclude that, while McKeon did not follow the defendant toward his desk because the smoke was so thick that she could not see in front of her face nor discern the location of the fire, the defendant was not dissuaded from attempting to retrieve his keys because he was aware that the fire was confined to the second floor.

The jury could also have reasonably concluded that the defendant exhibited a consciousness of guilt both before and after the fire. Before the fire, his attempts at drawing attention to phantom chemical smells on the second floor could reasonably lead one to believe that the defendant was trying to lay the basis for his exoneration by creating the impression that the conditions for a fire were present before the morning of

tity. It is conceivable that someone other than the defendant could have started the fire but not likely. Hugins and Keselewski were never under any suspicion and, furthermore, Keselewski was at another automobile dealership on the morning of the fire. Moreover, although it is hypothetically possible that an unidentified person could have entered the building through the rear door, proceeded to the second floor, lit the fire, and then left undetected, the jury could have reasonably rejected such speculation.

the fire and that it was simply an accidental conflagration. None of the witnesses to the defendant's queries concerning chemical odors noticed any such odor themselves and, significantly, the defendant never mentioned his concern to Keselewski, even after his fellow employees urged him to do so. Following the fire, the defendant told McKeon: "[T]hey think I did it." The defendant made this statement while Westervelt was still investigating the fire at Ekblade and before he had determined that the fire had been deliberately set. The jury might have reasonably concluded that the defendant was experiencing pangs of guilt before any determination of wrongdoing had been made. This is not a case in which the state's evidence is improbable and unconvincing; great deference must be given to the jury's conclusion that the defendant's conduct and statements manifested a consciousness of guilt. *State* v. *Osman*, 218 Conn. 432, 437, 589 A.2d 1227 (1991).

II

The defendant next claims that the trial court improperly ruled on the admissibility of certain evidence by: (1) denying his motion to strike McKeon's testimony that the defendant told her that "they think I did it"; (2) admitting the results of tests done on a can of debris taken from the second floor; and (3) admitting the rebuttal testimony of state inspector Tuscano. We address these claims in order.

A

The defendant claims that McKeon's testimony that he had told her "they think I did it," should have been stricken because it lacked relevance for the purpose of demonstrating consciousness of guilt. He argues that the statement is consistent with innocence and that the state never disproved his contention that law enforcement agents had spoken to him about the fire prior to his making the statement. The defendant maintains on

appeal that he had made the statement to McKeon because he had inferred, after the authorities posed questions to him about whether he had been smoking, that they thought that he might have been responsible for the fire.

"Only upon a showing of a clear abuse of discretion will this court set aside on appeal rulings on evidentiary matters." *Dunham* v. *Dunham*, 204 Conn. 303, 324, 528 A.2d 1123 (1987). Although the trial court found that the defendant's statement could support inferences that were consistent with both guilt and innocence, "[e]vidence need not be conclusive to be relevant; *State* v. *Greene*, 209 Conn. 458, 478, 551 A.2d 1231 (1988); and '[t]he fact that evidence is susceptible of different explanations or would support various inferences does not affect its admissibility, although it obviously bears upon its weight. So long as the evidence may reasonably be construed in such a manner that it would be relevant, it is admissible.' *State* v. *Reid*, [193 Conn. 646, 656 n.12, 480 A.2d 463 (1984)]; see *State* v. *Morrill*, 197 Conn. 507, 508, 498 A.2d 76 (1985)." *State* v. *Joly*, 219 Conn. 234, 252, 593 A.2d 96 (1991).

We conclude that, even if the statement were susceptible to different interpretations, the trial court did not abuse its discretion in determining that the defendant's assertion was relevant. Further, the defendant has not pointed to any evidence other than his own statements, nor do we find any, that indicates that the authorities had spoken to the defendant before he made the statement. The jury might reasonably have concluded that the defendant volunteered this statement not because of any urge to respond to innuendo that he was the responsible party but rather out of a consciousness of guilt. "No one doubts that the state of mind which we call 'guilty consciousness' is perhaps

the strongest evidence . . . that the person is indeed the guilty doer . . . ." 2 J. Wigmore, Evidence (Chadbourn Rev. 1979) § 273 (1).[3]

B

The defendant claims next that the trial court improperly admitted into evidence the spectrometric analysis of the contents of the can of debris taken from the second floor near the eastern wall. The defendant asserts that there was no proof that the debris was not contaminated in some way other than by arson. He argues that: (1) the debris could have come into contact with a cylinder head on the second floor that was covered with Siloo, the flammable accelerant found in the same debris; (2) prior to the time that the debris was subject to spectrometric analysis, Siloo could have been absorbed into the can containing the debris while the can was in storage; and (3) the results of the spectrometric analysis lacked probative value because: (a) the debris samples were not taken from the area where Westervelt identified a burn pattern; and (b) Westervelt's opinion on the origins of the fire did not refer to the state chemical laboratory test results. Because we conclude that there is no reasonable probability that the debris contained in state's exhibit T was contaminated by a source other than arson, the trial court did not abuse its broad discretion in determining that the evidence was probative and in admitting

[3] The defendant has raised two other claims related to the admission of his statement. Both merit little discussion.

In light of the lack of evidence that the authorities had spoken to the defendant before he made his statement, we conclude that there is no merit to the defendant's claim that he was forced, in violation of the fifth and fourteenth amendments to the United States constitution, to testify against himself in order to exonerate himself with respect to his statement.

Because we determine that the trial court did not abuse its discretion in admitting the statement, we disagree with the defendant's claim that a curative instruction was required with respect to the admission of the statement into evidence.

this evidence. *State* v. *Asherman*, 193 Conn. 695, 722, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985).

The trial court might reasonably have concluded that: (1) the cylinder head was not a cause of any alleged contamination because Keselewski had testified that all spare parts were cleaned prior to being stored on the second floor; and (2) the debris was not contaminated with Siloo while in storage because the different brands of diesel fuel antigel, including Siloo, had been stored in separate boxes and the only can that had leaked was a diesel fuel antigel of a different brand than Siloo—a brand that would have been detected by the spectrometric analysis. Further, contrary to the defendant's contention, Westervelt testified that he had taken his samples from the area where the fire originated. Westervelt also testified that he took samples and sent them to the state laboratory for analysis. The fact that Hubbell, the state laboratory chemist, testified as to the results of his tests on the samples Westervelt sent to him *after* Westervelt testified does not mean, as the defendant maintains, that the jury could *not* have concluded that Hubbell's testimony supported Westervelt's opinion that the fire had been started with the aid of a flammable accelerant. The jury is entitled to apply its own knowledge and common sense to the evidence. *State* v. *Sinclair*, 197 Conn. 574, 578, 500 A.2d 539 (1985).

C

The defendant next argues that Tuscano's testimony was not proper rebuttal testimony but merely bolstered the state's prior testimony that the burn patterns were consistent with arson instead of specifically addressing or refuting the possibilities raised by the defense of accidental causes of the fire. For these reasons he maintains that the trial court should not have admitted Tuscano's testimony.

"The admission of rebuttal evidence is . . . within the sound discretion of the trial court." *State* v. *Lisella*, 187 Conn. 335, 337, 445 A.2d 922 (1982). There is no requirement that a rebuttal witness must respond to every alternate theory offered by the defendant concerning the possible origin of the fire; a general contradiction of the testimony given by the defendant is considered permissible rebuttal testimony. *State* v. *Simino*, 200 Conn. 113, 123, 509 A.2d 1039 (1986). Tuscano's assessment that the burn patterns at the fire scene were consistent with the ignition of a flammable accelerant generally contradicted the testimony of defense expert Conlon. Moreover, Tuscano's testimony directly refuted Conlon's testimony that the fire burned at a rate that was inconsistent with the use of a flammable accelerant.

III

The defendant next claims that the trial court improperly failed to instruct the jury as requested in a number of areas. We address these claims seriatim.

A

The defendant first claims that the trial court improperly failed to charge, as requested, that there would be insufficient evidence of identity if the state failed to demonstrate that he had exclusive access to the second floor. We have already addressed the merits of this claim in reviewing the defendant's contention that the evidence was insufficient to convict him. As we stated with respect to that claim, we have never held that the state must prove that the defendant had exclusive access to the scene of the fire in order to obtain a conviction. *State* v. *McPhail*, 213 Conn. 161, 171, 567 A.2d 812 (1989). "The principal function of a jury charge is 'to assist the jury in applying the law correctly to the facts which they might find to be established . . . .' " *State* v. *Hernandez*, 218 Conn. 458, 462, 590 A.2d 112

(1991), quoting *State* v. *Sumner*, 178 Conn. 163, 170, 422 A.2d 299 (1979). We conclude that the trial court accomplished just that in its charge.

B

The defendant next claims that the trial court improperly refused to charge, as requested, that the state must proffer evidence that rules out all innocent explanations for the cause of the fire that are reasonably possible. We disagree.

"Proof of guilt [beyond a reasonable doubt] must exclude every reasonable supposition of innocence . . . it need not exclude every possible supposition of innocence." (Internal quotation marks omitted.) *State* v. *Little*, 194 Conn. 665, 672, 485 A.2d 913 (1984). Here, the trial court correctly charged the jury that proof beyond a reasonable doubt must exclude every reasonable hypothesis inconsistent with guilt.

C

The defendant next claims that the trial court improperly refused to charge, as requested, that the jury could not infer that the author of an article relied upon by the defendant had been disciplined or fired for employing improper laboratory techniques based solely upon questions to that effect posed by the prosecutor. Although briefed in a most limited fashion, the gravamen of the defendant's claim appears to be that questions posed by the prosecutor did not constitute evidence or a basis for drawing factual inferences. "If a requested charge is in substance given, the court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal." *State* v. *Ortiz*, 217 Conn. 648, 662, 588 A.2d 127 (1991). Although the trial court did not specifically instruct as requested, the jury received the substance of the request in the instruction that evidence is con-

fined to either exhibits or the testimony of witnesses. Further, "[t]he jury is presumed, in the absence of a fair indication to the contrary, to have followed the [trial] court's instructions as to the law." *State* v. *Gabriel*, 192 Conn. 405, 416, 473 A.2d 300 (1984).

IV

The defendant's final claim is that he was denied a fair trial pursuant to the due process guarantees of the fifth and fourteenth amendments to the United States constitution. The defendant essentially repeats, in a summary fashion, the allegations raised throughout the rest of his brief. The absence of merit underlying those claims refutes this last claim.

The judgment is affirmed.

In this opinion SHEA, GLASS and BORDEN, Js., concurred.

BERDON, J., dissenting. I disagree. The evidence construed in the light most favorable to sustaining the jury's verdict; *State* v. *Sinclair*, 197 Conn. 574, 576, 500 A.2d 539 (1985); is insufficient to support the finding of guilt beyond a reasonable doubt, even if we assume the fire was incendiary—that is, intentionally set.

In making our determination of whether the evidence was sufficient to convict the defendant, we place great weight on the trial court's decision on the motion to set aside the verdict and the motion for judgment of acquittal; *State* v. *Cobbs*, 203 Conn. 4, 13, 522 A.2d 1229 (1987); but its decision does not carve the conviction in stone. "The trial court's findings of fact are not conclusive, however, and we will reverse a judgment where the state's evidence is improbable and unconvincing and where all the facts found are insufficient to prove the

guilt of the defendant beyond a reasonable doubt." *State* v. *Osman*, 218 Conn. 432, 437, 589 A.2d 1227 (1991).

The majority opinion predicates its conclusion that there was sufficient evidence to support the conviction of the defendant on the following: (1) The defendant had an opportunity to set the fire, including ready access to Siloo, the accelerant the state theorized had been used to start the fire; (2) the defendant had an "insider's knowledge about the nature and location of the fire"; and (3) the defendant had manifested a consciousness of guilt. The collective effect of this evidence, however, was insufficient to establish beyond a reasonable doubt the defendant's guilt.

First, although the defendant had the opportunity to set the fire, he did not have sole access to the second floor where the fire originated or to the accelerant. We have held that opportunity alone, although a consideration, proves nothing. *State* v. *Villano*, 176 Conn. 301, 303, 407 A.2d 969 (1978); *State* v. *Skinner*, 132 Conn. 163, 167, 43 A.2d 76 (1945). *State* v. *Famiglietti*, 219 Conn. 605, 614, 595 A.2d 306 (1991), to which the majority opinion cites, is inapposite. In *Famiglietti*, the defendant arrived at the store shortly before the fire, the store was locked and no one else was visible inside. The jury heard testimony from the Sonitrol operator that the defendant had "coded out" just minutes before he noticed the fire. The operator also testified that he had heard "crackling" and "loud popping noises" while the defendant was still in the building. Id., 613. In the present case, however, the state concedes that the defendant did not have exclusive access to the premises. At least two other people, Calvin Hugins and Peter Keselewski, had unlimited access to the fire scene and to the Siloo, which gave them the same opportunity the defendant had to set the fire. Moreover, the majority opinion concedes that Hugins had been to the second

floor on the morning of the fire. Additionally, there was proof of access to the second floor by a rear door and there was no proof that it was closed, or locked, and no evidence that it was guarded, or under anyone's observation.

In *State* v. *Villano*, this court reversed the defendant's conviction for burglary, even though the defendant had been given a key to the house and, therefore, had *sole* access to it. The evidence in *Villano* showed that "[a]ll the doors and windows, including those in the cellar, were found locked. There was no sign of a forced entry. The [complainants] had not given anyone but the defendant permission to enter their home and no one else had a key to the premises." Id., 302. Notwithstanding the defendant's sole access to the premises, this court concluded in *Villano* that "it is clear that there was not sufficient evidence before the [trial] court to establish beyond a reasonable doubt that the defendant was guilty of the crimes charged." Id., 303. I cannot reconcile the majority's opinion in the present case, given that here the defendant did not have sole access to the premises where the fire originated, with the just result reached in *Villano*.

Second, the defendant's culpability cannot be predicated on the claim that the defendant "had an insider's knowledge about the nature and location of the fire." The defendant never stated that he had known that the fire had been located on the second floor. I cannot see how the jury could have reasonably concluded that the defendant's act of running to the back of the first floor to retrieve his truck keys amounted to an "insider's knowledge" of the origin and location of the fire. The reverse is more logical—that is, had he set the fire, he would not have left his keys in the building in the first place.

Third, the majority opinion states that the defendant's behavior, both before and after the fire, had "manifested a consciousness of guilt." Before the fire, the defendant repeatedly stated that he had smelled chemicals. Although this behavior could arguably be construed as laying the foundation that the fire had been accidental in nature, the opinion fails to cite any authority to support this "pre-crime" consciousness of guilt. Actions or words manifesting a consciousness of guilt, unlike evidence establishing the defendant's motive or plan, are logically predicated on the crime already having been committed. See, e.g., *State* v. *Joly*, 219 Conn. 234, 251, 593 A.2d 96 (1991); *State* v. *Smith*, 219 Conn. 160, 165, 592 A.2d 382 (1991); *State* v. *Thomas*, 214 Conn. 118, 121, 570 A.2d 1123 (1990).

The majority opinion further states that the defendant's statement to Annie McKeon after the fire, that "they think I did it," manifested a consciousness of guilt. The reasoning is based on the claim that no one had spoken to the defendant accusing him of setting the fire before he had made the statement. There is not a shred of evidence, however, to support this claim. Furthermore, the "they think I did it" statement is taken wholly out of context. McKeon went on to testify as follows:

"Q. On that date do you recall whether or not you were asked a question on 7/28/89, question, 'Has he given any indication that he personally had started the fire?'

"A. Yeah, I remember the question.

"Q. And what was [your] answer to that question?

"A. No.

"Q. At that time you told Mr. Dunham [a detective] that he had given no indication that he personally had started the fire?

"A. No."

Again, without more, I cannot see how the defendant's statement to McKeon revealed a consciousness of guilt. Surely, to convict the defendant on the basis of this evidence, "the jury would have had to resort to speculation and conjecture and to have drawn unwarranted inferences from the facts presented." *State* v. *Osman*, supra, 437.

Lastly, and perhaps most troubling for me, is the lack of a motive. The absence of motive was also troubling for the sentencing court.[1] Although I am aware that it is not necessary to prove motive in an arson prosecution; see *State* v. *Pinnock*, 220 Conn. 765, 792, 601 A.2d 521 (1992); in a case where the evidence is paper thin, lack of motive is significant. In *Pinnock*, we held that "presence *or absence* of motive . . . is a circumstance to be weighed with other evidence for the jury to consider. . . . *State* v. *Ruffin*, 206 Conn. 678, 681, 539 A.2d 144 (1988); *State* v. *Annunziato*, 169 Conn. 517, 530, 363 A.2d 1011 (1975). An instruction on motive and lack of motive is sometimes required because [e]vidence tending to show the existence or nonexistence of motive often forms an important factor in the inquiry as to the guilt or innocence of the defendant. *State* v. *Rathbun*, 74 Conn. 524, 529, 51 A. 540 (1902). *State* v. *Harris*, 182 Conn. 220, 224, 438 A.2d 38 (1980). The role motive plays in any particular case necessarily varies with the strength of the other evidence in the case. The other evidence may be such as to justify a conviction without any motive being shown. It may be so weak that without a disclosed motive the guilt of the accused would be clouded by a reasonable doubt. *State* v. *Rathbun*, supra, 529–30."

[1] The sentencing court stated: "To say the obvious, this is a case that troubles the Court very much. It troubled me during the course of the trial, because, as everyone will recall, even as a part of the arguments in the case and with reference to the instructions, there never appeared to be any particular motive for whatever happened [at] Eckblade on that particular day."

(Emphasis in original; internal quotation marks omitted.) *State* v. *Pinnock*, supra, 790. Indeed, under the facts of this case, the lack of a disclosed motive presented a fatal blow to an already weak case.[2]

"It is axiomatic that any conclusion, reasonably to be drawn from the evidence, which is consistent with the innocence of the accused must prevail. *State* v. *Guilfoyle*, 109 Conn. 124, 139, 145 A. 761 [1929]. *State* v. *Foord*, 142 Conn. 285, 294, 113 A.2d 591 (1955); *State* v. *Morrill*, [193 Conn. 602, 610, 478 A.2d 994 (1984)]. The trier may not reach a conclusion of guilt where the facts, established by the evidence, including those reasonably and logically inferred from other proven facts, are rationally consistent with the innocence of an accused. A conclusion of guilt requires proof beyond a reasonable doubt, and proof to that extent is proof which precludes every reasonable hypothesis except that which it tends to support, and is consistent with the defendant's guilt and inconsistent with any other rational conclusion. *State* v. *Smith*, 138 Conn. 196, 200, 82 A.2d 816 [1951]. *State* v. *Foord*, supra, 295; *State* v. *Martin*, [195 Conn. 166, 173, 487 A.2d 177 (1985)]; *State* v. *Morrill*, supra, 610–11. Moreover, inferences which do not have a basis in facts established by the evidence cannot be drawn or relied upon to sustain a verdict. *State* v. *Jackson*, 176 Conn. 257, 264, 407 A.2d 948 (1978). The jury may not resort to speculation and conjecture. *State* v. *Saracino*, 178 Conn. 416, 419, 423 A.2d 102 (1979). If the evidence is insufficient to sustain the burden of proof beyond a reasonable doubt, the verdict must be set aside. *State* v. *Jackson*, supra,

[2] Moreover, "especially when the prosecution's case against the criminal defendant is circumstantial, the fact that the defendant had some motive, good or bad, for committing the crime is one of the circumstances which, together with other circumstances, may lead the factfinder to conclude that he did in fact commit the crime; whereas lack of any discernible motive is a circumstance pointing in the direction of his innocence." 1 W. LaFave & A. Scott, Substantive Criminal Law (1986) § 3.6 (b), p. 324.

262." (Internal quotation marks omitted.) *State* v. *Carpenter*, 214 Conn. 77, 84, 570 A.2d 203 (1990). It is clear to me that the defendant was deprived of his state and federal constitutional rights to due process of law because, given the tenuous nature of the evidence used to convict him, the state did not meet its burden of proof beyond a reasonable doubt and, therefore, to convict the defendant, the jury must have resorted to speculation and conjecture. See *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State* v. *Carpenter*, supra, 82.

Because I would vacate the judgment and remand the matter to the trial court with direction to render judgment that the defendant was not proven guilty of the crime of arson in the first degree beyond a reasonable doubt, I have not discussed the defendant's other claims of error. By not addressing them, I do not adopt the conclusion and reasoning of the majority on some of these issues. Accordingly, I respectfully dissent.

2. Text of Order denying Motion for Reargument.

STATE OF CONNECTICUT
SUPREME COURT

NO. SC 14172

STATE OF CONNECTICUT

V.

JASON GRAY **:MAY 21, 1992**

ORDER

THE MOTION OF THE DEFENDANT, FILED APRIL 28, 1992, TO REARGUE AND FOR RECONSIDERATION, *EN BANC,* HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D DENIED. BERDON, J. WOULD GRANT.

BY THE COURT
FRANCIS J. DRUMM
CHIEF CLERK

3. Excerpts from oral motions presented in trial court claiming violations of Petitioner's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States during trial, as appear in the Appendix to Petitioner's Brief to the Supreme Court of Connecticut.

[Transcript . (1101) May 15, 1990. Appellant's appendix below, p.46.]

THE COURT: On the Jason Gray matter we're back on. The defense counsel has an additional motion.

MR. REILLY: Yes, your Honor. In my supplemental request to charge the first two paragraphs I cite cases, while they are in the civil law and not in the criminal they deal with the subject matter circumstantial evidence, speculation and the degree of proof which must be present before you can draw conclusions that an event happened. And in the proposition that I speak to is that if you could not sue Jason Gray and recover for damages in a civil action because it would be speculation, that the same element of speculation would exist in this case.

And my claim is that if we are going to allow in a criminal case that form of speculation which would not be allowed in a civil case, that my client's rights under the 5th and 14th Amendments of the Constitution of the United States would be violated by a procedure which would violate his rights to due process of law.

This case, under circumstances, should not be allowed to go to a jury where the claims of proof do not exclude the possibilities that must be overcome by the State in this instance.

Mr. Gray does not have control over the back doors. He does not have control over access to the stairs through the rear door. He has been at the front counter. There is evidence that the rear door was open and there has been no

proof that he had some one sitting there on his behalf guarding that back door preventing someone from going in, going up the stairs and coming down again, and there's been no proof that it would have been impossible under the facts of this case for that to have occurred.

There's certainly proof that there was adequate time. The element of time that is involved. We have a situation where a telephone call came in about 8:30 according, to Cal Hugins. At that time Jason Gray had been at the counter for about ten minutes, the call goes into the fire department, according to their records, at 8:44. There can be certainly no way that anybody can claim that the time that Jason Gray had been upstairs and came down was fixed and there's no proof to the amount of time and the e amount of opportunity for access.

It's a claim by the State that this is an arson and an arson situation would be most unusual and if a person is going to commit arson we can expect unusual activities and if we've got somebody doing in starting a fire, going out again, there's always going to be someone who is the last innocent person in the vicinity. That possibility has not been excluded in this case.

Under those circumstances this case should not go to the jury. If it goes to the jury then we're allowing speculation. And we're allowing a jury to come in with a verdict. And under those circumstances, that's not due process of law.

THE COURT: All right. This essentially is similar to arguments previously made by the defense at the end of the State's case and at the conclusion of the case.

MR. REILLY: Yes. With the support of the case at 206 Connecticut.

4. Excerpt from Brief In Support of Motion For Judgment of Acquittal, July 23, 1990, pages 21-23, 53-55, filed in trial court.

SUPERIOR COURT JULY 23, 1990
BRIEF IN SUPPORT OF MOTION FOR JUDGMENT OF ACQUITTAL

Pages 21-23:

No evidence was offered to prove Jason had not been accused and no evidence was offered to show he had no reason to believe he was suspected of having been a cause, in some manner, of the fire. The witness had immediately declared that she did not attribute to Jason any admission that he committed a crime.

The statement of Jason may be interpreted as following a conversation by Jason with a third person in which the third person indicated to Jason that he thought Jason caused the fire. There was no attempt by the State to prove that Jason had not had conversations with others. In effect by the maneuver, the State has called upon Jason to supply the missing element as if Jason was now required to assume the burden of proof to supply the missing element of fact and that he, Jason, must testify whether or not conversation with third party occurred.

This cannot be squared with Jason's rights under the Fifth and Fourteenth Amendment to the United States Constitution that the the defendant is not required to testify against himself, that no presumption can be created to cause the defendant to supply missing elements of necessary proof, and that the criminal trial must be fair, that no unfair burden shifting device be used. *Sandstrom v. Montana*, 442 U.S. 510, 524, 61 L Ed 2d 39, 51, 99 S. Ct. 2450. By some form

of tacit admission rule, the State places the burden upon Jason to explain but without first offering any proof that Jason had not been inquired of. It would appear that Jason's reaction to an unfair accusation is now used as a ploy to cause him to take the stand. There was no instruction to the jury that addressed this issue. The jury was left to assume the event had legal significance, that the event supported a claim of the State. They asked that the testimony be reread.
Compare:

United States ex rel Smith v. Braerly
(1967 CA3 Pa); 384 F2d 992

People v. Hodson (1950)
406 Ill. 328, 94 NE2d 166

The prosecution was merely seeking to "end run" the constitutional amendments by attempting to categorize the defendant's conduct as consciousness of guilt, and without proper foundation.

New Hope v. Duplessie (1975)
324 Minn. 417, 231 NW2d 548

The jury having been led to believe the evidence was relevant was allowed to speculate that no conversation had previously occurred between Jason and a third party, without proof. The jury was further led to believe that having presented this evidence, the State could rest on the point and call upon Jason to identify the accuser, who could now become a rebuttal witness.

Submitting an issue to a jury when a necessary element is missing as if the evidence justified the jury making determination of the issue and as if the element were not missing is error.

State v. Carpenter
214 Conn. 77, 83

Pages 53-55:

CONCLUSION

A conviction based upon the facts presented in this case violates Jason Gray's rights to a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. The existence of a burn pattern alone leads to a stated conclusion by the Fire Marshal when he knows other causes exist for the creation of a burn pattern. His opinion was independent of any evidence later produced, and therefor not based upon later evidence. He did not say the tests of the laboratory aided his opinion. The jury had no expert testimony as to the meaning of the tests. They were left to speculate. The refusal of the laboratory to conduct timely testing as a state agency denied the defendant the right to fair testing without possibility of contamination. The failure of the Fire Marshal to properly record the evidence that would demonstrate the patterns left by the cardboard cartons before they were consigned to the dumpster violated the defendant's right to fair trial, and the failure to search in the seams violated recognized forensic methods. The taking of samples from rusted out cans without proof of freedom from contamination, and the testing and offering same in evidence, violate rights to fair trial. The failure to recall the Fire Marshal violated rights to a fair trial and allowed speculation, particularly after instructions that glorified circumstantial evidence in general without regard to the flimsy and fabricated nature of the evidence adduce in this case. The state was aware that the issue of plastic contamination was in this case, and nevertheless did nothing to prove freedom from this source of contamination. The State Laboratory Criminologist, after refusing to test promptly, belatedly tested can #3, Exhibit T, after the disintegration by rusting through was evident. He denied qualification as a metallurgist and denied

having knowledge of the significance of the disintegration which was manifested by a shower of rust when he attempted to strike the can with an awl. The denial of fair trial is compounded by an attempt to claim guilty conduct in the conversation with Annie McKeon without subsequent attempt to prove that no conversations had occurred with an accuser. This element of proof was totally lacking and the jury was permitted to speculate that if the state was claiming that this was a spontaneous utterance, the defendant and not the state now has to present evidence to explain. This is the equivalent of an attempt to create a presumption. Presumptions that call for explanations by the defendant are unconstitutional, and not only violate the fair trial requirement, but also the presumption of innocence demanded by the Fifth Amendment.

Where it can not be said that a rational trier of fact could find guilt beyond a reasonable doubt, then, a conviction cannot "constitutionally stand" as it is violative of due process under the fourteenth amendment. *Jackson v. Virginia*, 443 U.S. 307, 317-318, 99 S Ct. 2781, 61 L Ed. 2d 560 (1979). "The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 61 L Ed. 2d at 567.

5. Excerpts from Brief filed in Supreme Court of Connecticut, Pages 35-36, 48-50.

E. The court erred in admitting testimony, and preventing fair cross-examination of Annie McKeon, and in failing to strike testimony for failure to establish sufficient foundation for the jury's consideration, and in refusing fair requests to charge.

Statements to Annie McKeon that "they" were after him for starting the fire are innocent. If a person is accused of doing something, whether negligently or intentionally, comment on the accusation is not guilty conduct. What fact makes this comment one of guilt? If a fact is absent, who has the burden of proof? The answer is found in the Fifth Amendment to the Constitution of the United States. Defendant had been asked to give written statement. (See: Ex CC for id) They had talked to Defendant about smoking. Once they raise the issue, the State had the burden of proving the adequate foundation, i.e., the defendant's state of mind was not reaction to accusation. They had to at least offer evidence so tending.

Where there is no evidence of an essential fact to be proved, a conclusion based thereon is mere conjecture and not an inference. *Waldron v. Skelly Oil Co.*, 363 Mo. 1146, 257 S.W.2d 615, 621 (1953); *State v. Mayell,* 163 Conn. 419 (discussed below)

An innocent man can be upset enough to comment on an accusation. The State knew Annie's statement had attributed Defendant's comment to his perception of conduct on the part of others.

In this manner, the State attempted to prove consciousness of guilt, but without proper foundation and without proof of necessary fact. All that was proven was that an inadmissible prosecution-serving accusation was made to De-

fendant. However, the State was permitted to make claims more extensive and claimed proof of culpable conduct.

Annie McKeon had immediately declared that she did not attribute to defendant any admission that he committed a crime.

The State's unrestricted use of this claim cannot be squared with defendant's rights under the Fifth and Fourteenth Amendment to the United States Constitution that the defendant is not required to testify against himself, that no presumption can be created to cause the defendant to supply missing elements of necessary proof, and that the criminal trial must be fair, that no unfair burden-shifting device be used. *Sandstrom v. Montana,* 442 U.S. 510, 524, 61 L.Ed.2d 39, 51, 99 S. Ct. 2450. By some form of tacit admission rule, the State places the burden upon Defendant to explain but without first offering any proof that Defendant had not been led to conclude that some form of blame was attributed to him. It would appear that Defendant's reaction to an unfair accusation was used as a ploy to cause him to take the stand. There was no instruction to the jury that addressed this issue. The jury was left to assume the event had legal significance, ...

[p. 48-50]:
Part II: The defendant did not receive a fair trial as required by the United States Constitution, 5th and 14th Amendments.

A conviction based upon the facts presented in this case violates Defendant Gray's rights to a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. The existence of a burn pattern alone leads to a stated conclusion by the Fire Marshal when he knows other causes exist for the creation of a burn pattern. His opinion was independent of any evidence later produced, and therefor not based upon later evidence. He did not say

the tests of the laboratory aided his opinion. The jury had no expert testimony as to the meaning of the tests. They were left to speculate. The refusal of the laboratory to conduct timely testing as a state agency denied the defendant the right to fair testing without possibility of contamination. The failure of the Fire Marshal to properly record the evidence that would demonstrate the patterns left by the cardboard cartons before they were consigned to the dumpster violated the defendant's right to fair trial, and the failure to search in the seams violated recognized forensic methods. The taking of samples from rusted out cans without proof of freedom from contamination, and the testing and offering same in evidence, violate rights to fair trial. The failure to recall the Fire Marshal violated rights to a fair trial and allowed speculation, particularly after instructions that glorified circumstantial evidence in general without regard to the flimsy and fabricated nature of the evidence adduce in this case. The state was aware that the issue of plastic contamination was in this case, and nevertheless did nothing to prove freedom from this source of contamination. The State Laboratory Criminologist, after refusing to test promptly, belatedly tested can #3, Exhibit T, after the disintegration by rusting through was evident. He denied qualification as a metallurgist and denied having knowledge of the significance of the disintegration which was manifested by a shower of rust when he attempted to strike the can with an awl. The denial of fair trial is compounded by an attempt to claim guilty conduct in the conversation with Annie McKeon without subsequent attempt to prove that no conversations had occurred with an accuser. This element of proof was totally lacking and the jury was permitted to speculate that if the state was claiming that this was a spontaneous utterance, the defendant and not the state now has to present evidence to explain. This is the equivalent of an attempt to create a presumption. Presumptions that

call for explanations by the defendant are unconstitutional, and not only violate the fair trial requirement, but also the presumption of innocence demanded by the Fifth Amendment. Fair requests to charge were filed and ignored and not granted and without explanation and without any instruction that led to a jury evaluation of the weaknesses presented by the State's case. The refusal to touch upon the issues which were presented in more ways than one to the trial judge is "plain error".

Where it can not be said that a rational trier of fact could find guilt beyond a reasonable doubt, then, a conviction cannot "constitutionally stand" as it is violative of due process under the fourteenth amendment. *Jackson v. Virginia*, 443 U.S. 307, 317-8, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). "The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt." *Jackson v. Virginia, 61 L.Ed.2d at 567.*

6. Excerpts of testimony of fire marshal in trial court.

....

(p244)

Q. Under conditions where you have bulbs that are not protected by wire cages, would you as a fire inspector caution against permitting any stored materials wrapped in paper or plastic from coming in contact with or being placed in an area close to light bulb surfaces?

A. Yes, sir. Not just plastics, anything. Anything coming in contact. . . . . .

(p245)

Q. Now, when heat is high in the room and it's in the form of gaseous vapors or air or whatever, will gaseous vapors give off radiant heat?

A. No.

Q. You do not believe that hot gas will give off heat that radiates?

A. Well, heat that radiates, yes, it doesn't give off radiant heat.

Q. Well, does it give off--

A. It's hot, yes.

Q. And will it give off and emit heat in the form of radiation?

A. The products of combustion, carbon monoxide, hot gases, uncombusted particles are hot, yes.

Q. Any hot substance, whether it's gas liquid or solid can give off heat by radiation, isn't that true or don't you know?

A. Well, you use the term radiation. Not everything radiates heat.

Q. Do you believe that gases will not radiate heat?

A. You used the word radiate, hot gases are hot, (p246) yes.

Q. All right. Will hot gases at the ceiling radiate heat onto a floor surface?

A. No, sir. I don't believe so. The floor surface is going to absorb heat but the only thing that is going to radiate heat is the fire.

Q. I'm speaking specifically of this fire, yes, sir. We have hot gases in this fire there's no doubt about it but they're not radiating heat.

Q. I'm asking you about the hot gases, will the hot gases radiate heat downward?

A. The entire room is hot. The hot gases will start at that ceiling level and slowly become lower and lower until they hit the floor level. The hot gases will heat the air in the room, if that's what you're trying to say.

Q. Well, I'm asking you about heat transfer. Hot gases will transfer heat by conduction but I'm asking you will they; emit heat by radiation?

A. No, sir. I have to say no.

Q. Have you read that in any textbook?

A. Not that I recall. You use the word radiation, I don't think it's a proper word for what you're trying to (p247) describe it's just not -- it's not correct.

Q. Have you read any textbooks about hot gases causing char patterns on floors?

A. No, sir. . . . . .

(p276)

Q. Did you know whether or not radiant heat from either a ceiling or from gases near the ceiling can cause combustion of a floor underneath the ceiling?

A. Radiant heat?

Q. Yes.

A. Radiant heat coming from a ceiling?

Q. Yes.

A. No fire involved? (p277)

Q. I'm talking about a hot ceiling. In this particular case we have a --

A. I would say, no. . . . . .

(281)

Q. And if the surface that is burning is a vertical surface it will give off radiant heat perpendicular to the surface, correct, that one direction?

A. Yes, sir.

Q. Give off radiant heat that will travel upward in a straight line?

A. I -- yes.

Q. Will it give off radiant heat that goes downward?

A. I don't know. I'm not a scientist or a chemist. I mean, we're talking about radiant heat, I don't know the answer to your question. . . . . .

(295)

Q. This is a publication that is published bu the International Association of Arson Investigators, Inc.?

A. Yes.

Q. Is that an organization which you find to be reliable?

A. Yes.

Q. And there is within this publication an article by John D. DeHaan?

A. Yes sir. . . . . .

(297)

Q. This is an article that is entitled, *Are Localized Burns Proof of Flammable Liquid Accelerants?* Do you have an opinion without knowing more than that this article is published in the *Fire and Arson Investigator* and is authored by John D. DeHaan?

A. Yes, Sir.

Q. Would you concede this is a reliable publication and a reliable article on the subject matter of investigating fire and arson?

A. Yes, sir. . . . . .

(298)

Q. "In a typical room fire in a house the airborne flames and hot gases fueling them occupy the upper portions of the room. Period. This mass of hot gases generates a considerable amount of radiant heat down onto the floor and stare surfaces."

Would you concede that that is a correct statement if it was made by John D. DeHaan?

A. Yes.

Q. ..... The language figure one illustrates fire involvement at various levels of the room are non-combustible surfaces like concrete such heat can induce spalling. Even on a floor where there is no other fuel when they one may observe charring, burning or spalling except where it is protected from overhead exposure from shelves, furniture, carpets, books or fall down debris from earlier (299) stages of the fire or structural collapse. Do you agree with that statement?

A. Yes. . . . . .

(303)

Q. Fire Marshal, you have in front of you an article which has been provided to you since the last question which is from a publication entitled, *The Fire and Arson Investigator* from the issue September 1987, Volume 38, (304) Number one and you have an article in that publication that commended at page 45 entitled, *Are Localized Burns Proof of Flammable Liquid Accelerants?*

A. Yes, Sir.

Q. And that article is it written by one John D. DeHaan?

A. Yes. ....

Q. And is Mr. DeHaan a recognized authority in the subject matter of fire and arson investigations?

A. Yes, sir. ....

Q. If Mr. DeHaan said, in respect to radiant heat that in a typical room fire in a house the airborne flames and hot gases fueling them occupy the upper portions of the room, this

mass of hot gases generates a considerable amount of radiant heat down onto the floor and stair surfaces. Would you agree with that statement if it was made by Mr. (305) DeHaan?

A. Yes, Sir.

Q. If Mr. DeHaan went on to say, "even in normally fueled fires the radiant heat can be several watts/CM-2 which quickly raises the temperature of the surface causing charring, pyrolysis, and ultimately combustion of floors." Would you agree with that statement?

A. Yes, I would.

Q. In the article, is there an illustration made by Mr. DeHaan?

A. Yes, sir.

Q. And does he give an illustration of a chair and a table sitting on a floor?

A. Yes, he does.

Q. And does he, in the illustration, show hot gases up near the ceiling?

A. He shows hot gases and flames.

Q. Hot gases and flames in the ceiling area?

A. Yes, sir.

Q. And then on the floor does he show areas not protected by the table which are in flame on the floor?

A. Yes, sir.

Q. And underneath the table and protected from radiant heat, does he show an area with no flames?

A. Yes, sir.

306)

Q. And the same underneath the chair?

A. Yes, sir.

Q. If Mr. DeHaan said that on non-combustible surfaces like concrete such heat can induce spalling, would you agree with that?

A. Yes, I would.

Q. If Mr. DeHaan said even on a floor where there is no other fuel, we may observe charring, burning or spalling except where it is protected from overhead exposure from shelves, furniture, carpets, books or fall down debris from earlier stages of the fire or structural collapse. Would you agree with that statement?

A. Yes, I would.

Q. If Mr. DeHaan said in structural -- in the commercial structures these exposed areas are often well defined by shelves and stock then a large fire can produce what appears to be a very carefully laid path down the center of each aisle. This pattern can be mistaken for a trailer of flammable liquid as in figure number two. Would you agree?

A. I would agree that he's correct. I would not agree that this is the situation in this case. . . . . .

(307)

Q. If Mr. DeHaan went on to talk about solid fuel and he described burning of solids at floor level may arise from furnishings or stock sitting on the floor from floor covering or from fall down of burning materials during the fire, you would agree with that?

A. Yes, I would.

Q. If he said a careful inventory of the scene and interviews with firefighters, owners or occupants will help reconstruct the nature of fuels at the scene before the fire. Would you agree with that?

A. Yes, I would.

Q. The damaged areas of the floor may then appear to be associated with the distribution it was those fuels. Would you agree with that?

A. Where is that?

Q. It would be the very next sentence?

A. Yes, that would be a fair sentence.

Q. If Mr. DeHaan then said, it is the isolated deep burn which generates so many questions. First, let's use, I think it means us, examine the distribution of a fire around a solid fuel as it burns. Figure three shows two arrangements of solid fuels, the same surrounding a solid (308) material in contact with the floor will produce localized charring around the margins of the solid while protecting the floor immediately underneath until it burns away. Would you agree with that?

A. Yes, sir.

Q. And then if he want on to say free standing solids generate radiant heat in all directions and can, therefore, produce more damage immediately underneath the burning fuel?

A. Yes sir.

Q. Would you agree with that?

A. Yes sir.

Q. The localized fuel load provides a hot spot which will continue to burn as long as there is fuel. Would you agree?

A. Yes, sir.

Q. This produces in its largest scale burn throughs of the floor immediately under upholstered chairs and beds while flooring nearby is left relatively intact. Would you agree with that?

A. Yes.

(309)

Q. All right. Fall down sources -- if he went on to say, fall down sources of fuel can be most illusive for the investigator then sometimes one must be a real detective to track down the culprits. Would you agree it's a tough job to find the correct picture ?

A. Yes, sir.

Q. Draperies, particularly cotton/polyester collapsed during a fire can cause deep burns. Would you agree with that?

A. Yes.

Q. Painting and other wall mounted decorations, plastic light fixture, diffuser panels, intercom cabinets, plastic windows and shades, boxes and stock from collapsing shelves and in later stages wooden structural members of the building have been seen to produce isolated burns in structure fire experiments conducted by the author.

Would you agree that that's a fair representation by Mr. DeHaan?

A. I agree it's a fair representation of the test that was done, yes. ....

(p318)

Q. He gives illustrations in figures seven and eight of that statement. He goes on to say, "hard edge burns were intentionally charred areas boarded directly on unburned substrates are sometimes described in the literature as proof of use of flammable liquids." Do you agree with that statement?

A. Yes sir.

Q. And then he goes on to say, "While these burns can be produced by flammable liquids they have also been produced by solid fuels burning in contact with the floor."

A. Yes, sir.

Q "Some plastics and synthetic fibers such as polypropylene and foam rubbers melt to a liquid or semi-liquid form during combustion and may mimic the appearance of a true flammable liquid burn." Would you (p319) agree with that statement/

A. Yes, sir.

(p320)

Q. The introduction to this article, the first paragraph the last sentence. It says, "Investigators should be suspicious of isolated low burns but they are not proof of the use of flammable liquids." Does he say that?

A. Yes, sir.

(p349)

Q. Is your opinion based upon something that is not presently in evidence?

A. No, sir.

Q. Is your opinion based solely upon the testimony and facts that you have related to the jury without any more?

A. Yes, sir.

MAY 11, 1990

REQUEST TO CHARGE

The defendant respectfully requests the court to charge the jury as follows:

2. There is no evidence in this case that the defendant had exclusive access to the second floor of the premises. There is evidence that the firemen found the rear door open. The second floor was available for access for any person choosing to use that entrance. Proof of defendant's exclusive access to the second floor is necessary to sustain a conviction if the State proves that the fire was intentionally set. If you find that the State has not proven the defendant had exclusive access by failing to show the rear door was locked to prevent access to others, you cannot find the defendant guilty beyond a reasonable doubt.

People v. Marin
65 NY 2d 741
481 NE 2d 556
492 NYS 2d 16 (1985)
(Court of Appeals, New York)

6. Evidence that defendant is said to have been aware that persons believed he was guilty is not an admission of guilt, and is not even evidence of consciousness of guilt.

See: People v. Marin, Supra, at
492 NYS 2d, p 19

7. Evidence said to indicate consciousness of guilt is generally considered to be weak proof of commission of crime.

People v. Moses
63 NY 2d 299, 308

8. Defendant's statements regarding noticing an odor are not evidence of an admission and are not evidence indicating consciousness of guilt, because as a threshold matter the State has not proven the statements to be false even at end. There is no proof that a qualified electrical expert examined the premises and ruled out accidental electrical causes of fire.

11. The State has the burden of proving that the fire did not result from accidental or natural causes and must prove this by evidence beyond a reasonable doubt.

Arson
5 Am. Jur. 2d 836, fn 16

12. If the State fails to prove the building was intentionally set on fire, the presumption is and the law implies that the fire was the result of accident or some providential cause rather than criminal design.

5 Am. Jur. 2d 836-7, fn 2

16. I charge you the evidence regarding the taking of sample #3 does not establish beyond a reasonable doubt the place from which sample #3 was taken. The Fire Marshal has identified can #3 as a sample taken from near the east wall and the State's disclosure to defendant so states. The Fire Marshal indicated in his testimony that a sketch made showed sample #3 as taken elsewhere. The location, in any event, was not measured nor otherwise recorded.

17. If you find that a reasonable inspection by the Fire Marshal disclosed the presence of an automobile engine cylinder head and that reasonable efforts to identify and record pertinent information relative to its location, and its actual packaging and preservation were not made, then you cannot

find that the State has proven beyond a doubt that petroleum products were not at the location prior to the fire.

18. If the State's evidence supporting a claim that a set fire occurred rests upon proof that evidence can #3 contained Siloo Diesel Anti Gel before the fire, then the State must also prove that the can could not have been accidentally contaminated by the introduction of molecules into the can prior to the date of the test. The defendant does not have the burden of proving the evident corrosion of the can was present before the date of test. The burden is upon the State to prove beyond reasonable doubt that the can was whole and not corroded to the point where its integrity was compromised at all times when contaminating circumstances were present.

21. If you find that the facts in evidence showed that other competent producing causes of a burn pattern were present, you cannot find that the opinion of the Fire Marshal excluded every reasonable supposition of innocence.

22. If you find that at the time the Fire Marshal testified that he was unaware that hot gases were a competent producing source of radiant heat or that radiant heat could produce burn patterns on a floor in patterns caused by shelves or solid combustible objects on the floor, and that he was mistaken in regard to known scientific facts, then you shall consider whether or not his opinion was flawed.

23. I charge you that there is no expert testimony in this case which connects the findings of the State Forensic Laboratory to a conclusion linking the findings to any claim of proof that a fire was set on July 7, 1989. This is a matter for expert opinion only. As lay persons you cannot speculate.

You are not at liberty to conclude that the findings support the claim of the State.

24. The Fire Marshal was not offered as an electrical expert on the State's case in chief and his testimony did not reveal that a complete inspection of the electrical system was made by a person qualified as an expert.

MAY 15, 1990

SUPPLEMENTAL REQUEST TO CHARGE

1. Where the claim is made that circumstantial evidence supports the claim of the State, the State must produce reasonable evidence to rule out all other causes which are reasonably possible. Failure to do so prevents drawing reasonable and logical inferences.

Toomey v. Danaher
161 Conn. 204 at 211

2. The state must prove either that the defendant and no one else had access to the area of the fire or that the defendant was in exclusive control of access to the area (Richards v Grace-New Haven Hospital, 137 Conn. 508, at 511) or that the defendant had exclusive control over access to the second floor.

See: Malvicini v. Stratfield Motor Hotel
206 Conn. 439, 445
"Exclusive" control.

5. If open doors and passage of time was sufficient for a third person to have had access to the second floor, a verdict must be rendered for defendant. The State has the burden to prove the impossibility of access by third persons beyond reasonable doubt. It is not sufficient to prove such access was unlikely or improbable.

6. There is no competent proof from any witness qualified as an electrical expert that the electrical system on the second floor of the parts department had been examined and found to be in good condition.

8. There is no testimony that the findings of the State Forensic Laboratory in respect of the samples taken from the

board supported the conclusions of the Fire Marshall. You will recall that Dr. Hubball limited his expertise to the testing of materials submitted and to his ability to relate the findings of the Gas Chromotography, and did not claim to possess the knowledge necessary to relate the findings to the conditions found at the scene. There is uncontradicted evidence that the usage of plastic bags in connection with samples may contaminate the results of Gas Chromotography. There is evidence that plastic bags were used, and the extent to which contamination may have resulted prevents your speculating in the absence of any attempt by the State to relate the findings of the Gas Chromatography to any finding at the fire scene by the testimony of expert witnesses. The burden is on the State to prove the competency of the evidence and to connect up the evidence it has produced.

RE: CIRCUMSTANTIAL EVIDENCE EXCLUSIVE CONTROL - FIRE CASES

Hubert v. Aztec Brewing Co. 26 Cal App 2d 664, 690, 80 P2d 185, 1016.

Gentleman v. Nadell & Co. 194 Cal App. 2d 545, 17 Cal Rptr 389.

Verkamp Corp of Kentucky v. Hubbard 296 SW2d 740

Menth v. Breeze Corp 4 NJ 428, 73 A2d 183

Gray v. E.J. Longyear 78 NM 161, 429 P2d 359

FAILURE TO ELIMINATE OTHER CAUSES OF FIRE:

Gallagher's Successor's, Inc. v Consolidated Edison 52 App Div 2d 547, 382 NYS2d 75.

Clark v. Pennsylvania Power & Light Co. 336 Pa 75, 6 A2d 892

Williams v. Lauderdale 209 Ark 418, 191 SW2d455

Tedrow v. DesMoines Housing Corp 249 Iowa 766, 87 NW2d 463